Housing Law Bulletin

Published by the National Housing Law Project
614 Grand Avenue, Suite 320, Oakland, California, 94610
(510) 251-9400 • www.nhlp.org • nhlp@nhlp.org

 ISSN 0277 8491

FINAL ADMISSION AND OCCUPANCY REGULATIONS ISSUED[1]

On March 29, 2000, nine months after the close of the comment period, HUD published final regulations concerning admission and occupancy requirements in the public housing and Section 8 programs.[2] These rules are effective as of April 28, 2000, and make a number of important changes to the proposed regulations that were published on April 30, 1999.[3] The proposed regulations were reviewed in the May 1999 issue of the *Bulletin*.[4] In the final regulations implementing the merger of the Section 8 certificate and voucher programs,[5] HUD included the provisions relevant only to the tenant-based program that had initially been included in the proposed comprehensive admissions and occupancy rule. Those changes were reviewed in the November/December 1999 issue of the *Bulletin*. This article discusses the changes made to the proposed regulations by the March 29, 2000 final rule, and in particular how the final rules responded to the issues raised in our earlier article concerning admissions, rents, community service and the Family Self-Sufficiency program.[6]

[1]This article was written for NHLP by Barbara Sard, Director, Housing Policy, Center on Budget and Policy Priorities.

[2]Changes to Admission and Occupancy Requirements in the Public Housing and Section 8 Housing Assistance Programs, 65 Fed. Reg. 16,692 (Mar. 29, 2000). (Hereinafter all citations to the final rule will cite to the section of the regulations as it appears in the Federal Register). These regulations implement various provisions of the Quality Housing and Work Responsibility Act (QHWRA), Pub. L. No. 105-276, 112 Stat. 2461 (Oct. 21, 1998).

[3]64 Fed. Reg. 23,460 (Apr. 30, 1999).

[4]*HUD Proposes One More Set of Regulations to Implement the 1998 Housing Act*, 29 HOUS. L. BULL. 87 (May, 1999).

[5]64 Fed. Reg. 56,894 (Oct. 21, 1999), as amended by 64 Fed. Reg. 59,620 (Nov. 3, 1999); Correction, 65 Fed. Reg. 16,819 (Mar. 30, 2000).

[6]For other articles on QHWRA and HUD's implementation of the act, *see Congress' New Public Housing and Voucher Programs*, 28 HOUS. L. BULL. 165 (Oct./Nov. 1998); *HUD Offers Demolition/Disposition Guidance for the New Public Housing Era*, 29 HOUS. L. BULL. 100 (May 1999); *Final Voucher Program Regulations Issued*, 29 HOUS. L. BULL. 203 (Nov./Dec. 1999); *PHA Plan Update*, 29 HOUS. L. BULL. 208 (Nov./Dec. 1999); *Tenant-Based Section 8 Renewal Rule*, 30 HOUS. L. BULL. 1 (Jan. 2000).

TABLE OF CONTENTS

NHLP HOSTS NEW AUDIO TELECONFERENCE ON ADMISSIONS, OCCUPANCY AND RENTS ON MAY 16 *see pg. 37*

Rules Reorganized by Program

In a reversal of the recent consolidation of rules relevant to admission and rent requirements for all HUD programs into 24 C.F.R. Part 5, these final rules place the requirements applicable to particular programs in the separate sections of the regulations that govern each program. As a result, Part 5 will now contain the common occupancy requirements that apply to more than one program, such as common definitions and the rules governing what is income and when agencies may require a minimum rent payment.[7] The targeting, local preference and occupancy rules that apply only to public housing or the Section 8 voucher program will now be found in Part 960 and Part 982, respectively. In addition, HUD has added to Part 5 a new heading that consolidates the occupancy requirements applicable to the project-based Section 8 programs.[8]

Who Will Get Public Housing?

Income eligibility and targeting. The final rules make no significant changes in the income eligibility and targeting requirements for public housing.[9] HUD has, however, clarified that a PHA may determine annual income for both eligibility and targeting purposes by considering past income over whatever prior period the PHA decides is "the best available indicator of expected future income,"[10] rather than the common practice of projecting income forward based on the family's income in the previous month. The rule on annualization of income now specifically references "seasonal or cyclic" income as situations when it may not be feasible to project annual income based on recent earnings.[11] In the preamble, HUD notes that using this flexibility to determine annual income could assist PHAs to meet the targeting requirements for extremely low-income families.[12] There is considerable evidence that a significant portion of working poor families and those moving from welfare to work are unable to sustain consistent work hours or hourly earnings over a 12-month period.[13]

HUD did not include any mechanism for PHAs to obtain a waiver from the targeting requirements for public housing, unlike the final Section 8 voucher rule, despite the statutory authorization to do so.[14] Presumably the different treatment of the two programs is because 75 percent of vouchers but only 40 percent of public housing units must be targeted to extremely low-income families. In the preamble to the regulations, HUD stated its belief that "most" jurisdictions will not have difficulty meeting the public housing targeting requirement.[15]

The final rules make no significant changes in the income eligibility and targeting requirements, but a PHA may determine annual income by considering past income instead of projecting income.

Tenant selection policies that promote income-mixing. The final rules delete the prior requirement that PHAs design their tenant selection policies to achieve a "broad range of incomes," for which the statutory authority was repealed.[16] In addition, the final public housing admission rules omit any mention of the statutory prohibition against concentration of relatively lower-income families in particular projects or buildings.[17] Now the rules require only that public housing tenant selection policies must "provide for deconcentration and income-mixing in accordance with the PHA plan," cross-referencing to the PHA plan regulations without further elaboration.[18] As noted in the article in the November/December 1999 *Bulletin* concerning the final PHA

[7] 24 C.F.R. Part 5, Subparts A, D and F (definitions); 24 C.F.R. § 5.609 et seq.; 24 C.F.R. § 5.630.

[8] 24 C.F.R. § 5.653 et seq.

[9] *Id.* § 960.202.

[10] 65 Fed. Reg. 16,712 (Mar. 29, 2000).

[11] 24 C.F.R. § 5.609(d).

[12] 65 Fed. Reg. 16,712 (Mar. 29, 2000). Extremely low-income families are defined as those with incomes that do not exceed 30 percent of the HUD-adjusted area median. 24 C.F.R. § 5.603(b).

[13] *See, e.g.*, Kathryn Edin and Laura Lein, *Making Ends Meet: How Single Mothers Survive Welfare and Low-Wage Work.* New York: Russell Sage Foundation (1997) pp. 132-3; Christina Smith FitzPatrick and Edward Lazere, *The Poverty Despite Work Handbook*, Center on Budget and Policy Priorities, April 1999, pp. 114-115; Anu Rangarian et al., *Employment Experiences of Welfare Recipients Who Find Jobs: Is Targeting Possible?* Princeton, NJ: Mathematica Policy Research, Inc. (1998); Sharon Parrott, *Welfare Recipients Who Find Jobs: What Do We Know About Their Employment and Earnings?* Center on Budget and Policy Priorities (November, 1998).

[14] 42 U.S.C.A. § 1437n(d) (West Supp. 1999); *see* 24 C.F.R. § 982.201(a)(2)(ii) (64 Fed. Reg. 56,894, 56,911 (Oct. 21, 1999).

[15] 65 Fed. Reg. 16,701 (Mar. 29, 2000).

[16] *See*, 24 C.F.R. §§ 960.204(a)(2) and 960.205(c) (1999); 42 U.S.C.A. § 1437d(c)(4)(A) (West Supp. 1999).

[17] 42 U.S.C.A. § 1437n(a)(3)(A) (West Supp. 1999). There is no final rule similar to proposed 24 C.F.R. § 5.607(a)(3) (64 Fed. Reg. 23,460 (Apr. 30, 1999)).

[18] 24 C.F.R. §§ 960.204(a)(2) and 960.205(c). In these rules as well as in the plan rules, HUD has construed the QHWRA amendments to section 16 of the U.S. Housing Act as imposing an obligation on PHAs to utilize tenant selection policies designed to mix incomes in public housing, despite the new provision that makes income-mix criteria for tenant selection optional for PHAs. The plan rule, at 24 C.F.R. § 903.7(c)(2) (64 Fed. Reg. 56,844 (Oct. 21, 1999)), references section 16(a)(3)(B), 42 U.S.C.A. § 1437n(a)(3)(B) (West Supp. 1999), which states: "A public housing agency shall submit with its annual public housing agency plan under section 5A an admissions policy designed to provide for deconcentration of poverty and income-mixing...." *Compare* section 16(a)(1), 42 U.S.C.A. § 1437n(a)(1) (West Supp. 1999), which states: "A public housing agency *may* establish and utilize income-mix criteria for the selection of residents for dwelling units in public housing projects...." Both provisions were added by § 513(a) of Pub. L. No. 105-276, 112 Stat. 2461, 2543 (Oct. 21, 1998).

plan rules, these rules fail to provide clear guidance to PHAs concerning deconcentration.[19] HUD has recently issued a new proposed rule concerning the deconcentration obligation.[20]

Residency preferences. The final rules include an important new legal standard governing public housing residency preferences, and reinstate protections for the elderly and disabled when PHAs use a working preference. The proposed rules would have permitted PHAs to use residency preferences in selecting public housing tenants without HUD approval or review and without any explicit requirement that such preferences be consistent with civil rights obligations.[21] The final rules subject public housing residency preferences to the identical standard that HUD recently promulgated for the Section 8 voucher program: residency preferences must not "have the purpose or effect of delaying or otherwise denying admission to the program based on the race, color, ethnic origin, gender, religion, disability, or age of any member of an applicant family."[22] The incorporation of any residency preference in the PHA Plan is the vehicle for HUD review.[23]

Working preferences. The final rules reinstate the requirement that if a PHA adopts a preference for public housing admission for people who are working, an applicant must be given the benefit of the working preference if the head and spouse, or sole member, is age 62 or older or is a person with disabilities.[24] By using the term "person with disabilities" rather than stating that the preference must extend to persons receiving disability benefits or other payments based on an individual's inability to work as the prior rule did, the final rule may benefit additional disabled applicants.[25] Such additional applicants include those who have not yet had their disability status adjudicated or those who, despite their disability, receive income from a different source, such as a pension or child support.

The final rules state that to be considered a "working family," the head, spouse or sole person must be employed, although no minimum number of work hours is stated.[26] Previously, the rule permitting preferences for working families had specified that participants in and graduates of educational and training programs designed to prepare individuals for the job market could be considered to be working.[27] While the education/training provision has been omitted, a PHA could, under its general authority to set local preferences, give a preference to participants in and graduates of training programs—as well as to persons complying with welfare agency work requirements—that is equivalent to the preference given to working families.

For public housing, unlike Section 8, PHAs are permitted to combine a working preference with a preference based on the amount of a family's income.[28] That is, a PHA could have a preference for admission to its public housing program for working families with incomes above $20,000 per year (subject to compliance with income targeting requirements and possibly to compliance with any new rule on deconcentration)[29]. Such a local preference is not permitted in the tenant-based or project-based Section 8 programs due to the prohibition on skipping based on income.[30]

Local preferences and fair housing. A number of comments had criticized HUD's proposed rescission of the explicit regulatory requirement that any tenant selection preferences must be established and administered in accordance with civil rights laws and must be consistent with HUD's affirmative fair housing objectives.[31] While HUD declined to retain this specific rule, it maintains that "the final rule does require preferences to comply with nondiscrimination requirements"[32] because the nondiscrimination and equal opportunity requirements compiled in the part of the regulations containing general program requirements apply to prefer-

[19]29 HOUS. L. BULL. at 210-211.

[20]A proposed rule substantially revising the deconcentration requirements in the PHA plan regulations was published on April 17, 2000 (65 Fed. Reg. 20,686). Comments are due June 1, 2000. In essence, the proposed rules would require mandatory skipping to admit "higher income" families to "lower income" developments and vice versa, with "higher" and "lower" income being determined by each PHA based on the average income of tenants in its general occupancy developments. PHAs would be excused from the mandatory skipping requirement if they gave preference to applicants who are homeless, victims of domestic violence, or paying more than 50 percent of their income for rent. Such mandatory skipping would control over PHAs' local preferences. See 24 C.F.R. § 960.206(a)(3).

[21]Proposed 24 C.F.R. § 5.410(e)(1) (64 Fed. Reg. 23,460 (Apr. 30, 1999)).

[22]24 C.F.R. § 960.206(b)(1)(iii)(public housing); *Id*. § 982.207(b)(1)(vouchers).

[23]See preamble discussion at 65 Fed. Reg. 16,700-16,701 (Mar. 29, 2000).

[24]24 C.F.R. § 960.206(b)(2). The proposed rules would have eliminated this requirement by repealing 24 C.F.R. § 5.415(b)(1999).

[25]In 24 C.F.R. § 5.403, the final regulations include the definition of "person with disabilities" contained in 42 U.S.C.A. § 1437a(b)(3)(E) (West Supp. 1999).

[26]24 C.F.R. § 960.206(b)(2).

[27]24 C.F.R. § 5.415(b)(1999).

[28]The preamble makes clear that the omission from 24 C.F.R. § 960.206(b)(2) of any reference to the amount of income was intentional. 65 Fed. Reg. 16,700. *Contrast* 24 C.F.R. § 5.655(c)(2) discussed below in the section on admission to project-based Section 8 units. The prohibition against skipping based on income in the voucher program is stated in 24 C.F.R. § 982.207(d) (64 Fed. Reg. 56,894 (Oct. 21, 1999)).

[29]*But see, Public Housing Working Family Preference Thwarts Desegregation Efforts*, 29 HOUS. L. BULL. 166 (Sept. 1999).

[30]See n. 28, *supra.*

[31]24 C.F.R. § 5.410(i)(1999).

[32]65 Fed. Reg. 16,700 (Mar. 29, 2000).

ence-setting as well as to other policies.[33] Advocates should also remember, as the preamble states repeatedly,[34] that the requirement that local preferences be included in the PHA plan means that not only do tenants and the public have input into their formulation, but that PHAs must certify that their preferences (along with other components of their plans) comply with civil rights obligations.[35] Under the final PHA plan rules, to be in compliance with the certification requirement (that the PHA will affirmatively further fair housing) means, *inter alia,* that PHAs must examine their selection preferences to determine if they interfere with fair housing choice and take reasonable steps to alter them if necessary.[36] HUD must review each PHA plan for civil rights compliance.[37]

Who Will Get Project-Based Section 8 Units?

Other than separately stating the provisions relevant to the project-based Section 8 programs, the final rules make no changes in the regulations governing income eligibility and targeting for these programs.[38]

The major change in the admission rules for the project-based Section 8 programs concerns the use of a residency preference. The final rules retain the requirement that HUD must approve any use by a private owner of a residency preference,[39] whereas the proposed rules would have rescinded any regulatory oversight of private owner use of residency preferences for project-based Section 8 units.[40] The mechanisms for HUD approval, however, are changed. There are three ways a private owner can obtain HUD approval to use a residency preference.

- If the PHA plan for the area in which the project is located contains a residency preference, and HUD approved the PHA plan, the private owner can use the same preference without further review by HUD.[41]
- If the project's Affirmative Fair Housing Marketing plan establishes a residency preference for the housing market area, and HUD approved that plan, the owner may prefer residents *of the entire housing market area.*[42]
- The owner may submit a modification of the project's Affirmative Fair Housing Marketing plan for HUD approval.[43]

Substantively, a residency preference proposed by a private owner is subject to the same "purpose or effects" test stated above regarding public housing residency preferences.[44] To reinforce the point, the final rules also state that a private owner may only adopt or implement residency preferences in accordance with the generally applicable non-discrimination and equal opportunity requirements.[45]

As in the proposed rule, private owners are permitted to adopt preferences for working applicants.[46] The rule was somewhat changed, however, consistent with the similar public housing provision: "working" is now restricted to "employed" and the requirement to give equivalent preference to certain disabled persons is broadened.[47] Private owners are not, however, permitted to prefer working applicants based on the amount of their earned income.[48]

The final rules retain the requirement that HUD must approve any use by a private owner of a residency preference, whereas the proposed rules would have rescinded any regulatory oversight of private owner use of residency preferences.

What Will Public Housing Rents Be?

Flat rents and rent choice. The final rules provide clearer guidance to PHAs on the standard and methodology they must use in setting the flat rent for each public housing unit. HUD has added to the statutory language (the flat rent must be "based on" comparable market rent[49]) the specification that the flat rent "is equal to the estimated rent for which the

[33] 24 C.F.R. § 5.105(a) contains the nondiscrimination and equal opportunity requirements that may apply to housing programs, "as noted in the respective program regulations." 24 C.F.R. § 960.103(a) makes the authorities cited in § 5.105(a) applicable to public housing tenant selection policies as well as other aspects of public housing administration covered in Part 960.

[34] 65 Fed. Reg. 16,700-16,701 (Mar. 29, 2000).

[35] 24 C.F.R. § 903.7(o) (64 Fed. Reg. 56,844 (Oct. 21, 1999)).

[36] *Id.* § 903.7(o)(2).

[37] 42 U.S.C.A. § 1437c(A)(i)(1) (West Supp. 1999).

[38] These rules now appear at 24 C.F.R. § 5.653, and apply to the project-based Section 8 programs other than the moderate rehabilitation and project-based certificate or voucher programs which are administered by PHAs.

[39] 24 C.F.R. § 5.655.

[40] Proposed 24 C.F.R. § 5.410 (64 Fed. Reg. 23,460 (April 30, 1999)).

[41] 24 C.F.R. § 5.410(d)((2)(iii)(1999)) had required HUD approval of any local preference an owner wished to adopt. Owners could only use local preferences that had been adopted by the local PHA for its tenant-based Section 8 program. 24 C.F.R. § 5.410(d)((2)(ii)(1999). Under the proposed and final rules, owners can now adopt their own system of tenant selection preferences. 24 C.F.R. § 5.655(b)(1) and (2).

[42] *See* HUD, Occupancy Requirements of Subsidized Multifamily Housing Programs, Handbook 4350.3, CHG. 27, Appendix 2 (Affirmative Fair Housing Marketing Plan) (Sept. 1995).

[43] 24 C.F.R. § 5.655(c)(1)(iii).

[44] *Id.* § 5.655(c)(1)(iv).

[45] *Id.* § 5.655(c)(1).

[46] *Id.* § 5.655(c)(2).

[47] *Id.* § 5.655(c)(2)(i). See notes 24 and 25 *supra.*

[48] *Id.* § 5.655(c)(2)(ii).

[49] *Id.* § 1437a(2)(B)(i)(I).

TELECONFERENCE ON CHANGES TO ADMISSION, OCCUPANCY AND RENT STANDARDS FOR PUBLIC HOUSING AND SECTION 8 PROGRAMS

The National Housing Law Project announces a new one-hour teleconference on the recent changes to the admission, occupancy and rent regulations for the public housing and Section 8 programs. Specifically, the changes concern choice of rent, community service and self-sufficiency in public housing, and admission preferences and determination of income and rent for the public and Section 8 programs. This new teleconference will provide advocates and practitioners with an in-depth review and analysis of the final regulatory changes made by HUD to the programs and will discuss the effects that these changes will have on residents of and applicants for public and Section 8 assisted housing.

The audio teleconference will take place on TUESDAY, MAY 16, 2000. The teleconference will start at 10 a.m. Pacific Time (1 p.m. Eastern).

Who Should Participate?

Housing attorneys, advocates, tenant organizers, housing sponsors and others working in the housing field are invited to join in this unique teleconference that will be presented by Catherine Bishop of NHLP's staff and Barbara Sard of the Center on Budget and Policy Priorities.

Cost

In addition to bearing your own long-distance charges, there is a $30/telephone line charge for persons wishing to participate in the teleconference. There are, however, no limits on the number of people that may listen in on the same line (you may use a speakerphone). Persons who register before the deadlines will receive, or be able to download, materials prepared for use during and after the teleconference.

Registration

Persons interested in participating in this teleconference must register with the National Housing Law Project by Monday, May 8, 2000. All persons who pre-register by that date will receive teleconference materials and dial-in instructions before the teleconference.

Enclosed is a registration form for the teleconference. The registration form is also available from the NHLP website at www.nhlp.org Please mail the registration form to NHLP together with your payment.

PHA could promptly lease the public housing unit after preparation for occupancy."[50] In formulating their estimates, PHAs must consider specified attributes of each unit, and must maintain documentation of their methodology.[51] The statutory requirement that flat rents be designed to encourage self-sufficency and avoid a disincentive to continued occupancy by working families is restated,[52] but appears to play no role in the methodology PHAs are required to use.

Reinforcing the mandatory phrasing of the regulations, HUD states unequivocally in the preamble that PHAs should use a uniform standard and comparable methodology, in part due to cost concerns.[53] In the negotiated rulemaking on the public housing operating subsidy, HUD has agreed to include any shortfall between flat rents paid by tenants and allowable costs in the calculation of PHAs' need for operating subsidy in the following year.[54] It appears that now that HUD has agreed to bear the cost of low flat rents, HUD is discouraging PHAs from setting their flat rents below "market." How effective this discouragement will be in the absence of a financial disincentive to PHAs probably depends on how aggressively HUD reviews PHAs' flat rents.

There were several other minor changes concerning flat rents. HUD added to the regulations the requirement that each family be informed *in writing* of the dollar amount of the rent it would pay under the flat rent and under the PHA's income-based rent method, and of the PHA's policies on switching types of rent in circumstances of financial hardship.[55] This information must be provided annually (and not more frequently) to tenants paying income-based rents.[56] For tenants paying flat rents, however, PHAs need only provide such written information at the time of the income reexamination (which may be as infrequent as every three years) unless a family requests the information sooner *and* provides the PHA with updated income information.[57] PHAs still must annually redetermine family composition for families paying flat rents.[58]

In addition, HUD has clarified that PHAs must adopt written policies "for determining when payment of flat rent is a financial hardship for the family."[59] PHAs' compliance with this requirement should avoid the case-by-case discretionary judgment that advocates had feared. On the timing of switching a family from flat to income-based rent, the final regulations state that PHAs must determine *within a reasonable time* whether a family is experiencing financial hardship, and that once the determination is made, the switch should be "immediately allowed."[60] While this regulatory standard lacks an objective measure of the time which may elapse between the family's request and the effective date of the rent change, the preamble states that generally 30 days or less should elapse from request to change.[61] In light of this regulatory discretion, it is important that the PHA plan include an objective time standard within which a PHA must change a family's rent if it has not denied the request to switch to income-based rent.[62] The same need for specificity of implementation time exists for requests by tenants paying income-based rents for interim recertifications due to loss of income, as the regulations give PHAs a "reasonable" time in which to act.[63]

HUD has clarified that PHAs must adopt written policies "for determining when payment of flat rent is a financial hardship for the family.

Finally, HUD has clarified the interaction of flat rents with several other policies. A tenant choosing to pay a flat rent does not qualify for utility reimbursement.[64] In the unlikely circumstance that a PHA's minimum rent exceeds the flat rent, the minimum rent controls.[65] PHAs that had adopted ceiling rents prior to October 1, 1999, can use them *instead of* setting flat rents until October 1, 2002. By that date, each PHA must set flat rents, but a PHA can continue to have ceiling rents as part of its income-based rent policy.[66]

Delay of rent increases when public housing tenants secure new jobs. In the final regulations, HUD has made a number of important changes and clarifications in the mandatory disregard of earnings of certain public housing tenants. Most importantly, the final rules limit each qualifying family member's entitlement to the disregard to one four-year period in a lifetime. During the four-year continuous period beginning when a member of a "qualified family" begins employment or increases his or her earnings, PHAs must

[50] *Id.* § 960.253(b)(1).

[51] *Id.* §§ 960.253(b)(2) and (5).

[52] *Id.* § 960.253(b)(3).

[53] 65 Fed. Reg. 16,707 (Mar. 29, 2000).

[54] Draft 24 C.F.R. § 990.109 (March 7, 2000)("Projected operating income level") (distributed to Negotiated Rulemaking Committee on the Operating Fund). This rule is expected to be published for public comment shortly.

[55] 24 C.F.R. § 960.253(e).

[56] *Id.* § 960.253(a)(1).

[57] *Id.* § 960.253(e)(2).

[58] *Id.* § 960.257(a)(2).

[59] *Id.* § 960.253(f)(1).

[60] *Id.* § 960.253(f)(2).

[61] 65 Fed. Reg. 16,708 (Mar. 29, 2000).

[62] 24 C.F.R. § 960.257(c) requires that PHA reexamination policies be in accordance with the PHA plan. *See also* 65 Fed. Reg. 16,712 (Mar. 29, 2000).

[63] 24 C.F.R. § 960.257(b).

[64] *Id.* § 960.253(b)(4).

[65] *Id.* § 960.253(a)(2).

[66] *Id.* § 960.253(d); 65 Fed. Reg. 16,709 (Mar. 29, 2000).

disregard 100 percent of the net increase in income due to earnings for 12 months, and 50 percent of the increase for an additional 12 months.[67] The regulations phrase the PHA action as "disallowing" or excluding such income from a family's annual income on which the rent obligation is calculated.[68] HUD chose a four-year period in which the disregard could apply for each family member, rather than the two-year duration of the disregard itself, in order to allow for changes in jobs and periods of unemployment.[69]

HUD revised the final rule to clarify which public housing families qualify for the mandatory delay in rent increase. For families that qualify due to current or prior receipt (within the previous six months) of benefits or services under Part A of Title IV of the Social Security Act, the final rule states that such benefits or services include the Department of Labor-administered Welfare-to-Work programs (generally administered through the Workforce Investment Boards at the state and local levels) as well as the TANF program.[70] Further, the rule clarifies that "[t]he TANF program is not limited to monthly income maintenance, but also includes such benefits and services as one-time payments, wage subsidies and transportation assistance—provided that the total amount over a six-month period is at least $500."[71] The final rule also clarifies that the qualifying event for a member of a family that currently or previously received such benefits or services may be either new employment or increased earnings.[72]

A family member may be eligible for the mandatory delay in rent increase if his or her earnings increase "during" participation in any economic self-sufficiency or other job training program.[73] The preamble clarifies that this includes an increase in earnings *after* the completion of the primary part of the training program *if* the person continues to receive some amount of training, monitoring, counseling other assistance from the program when the earnings increase.[74] HUD's responses to public comments contained in the preamble also clarify that such programs include technical schools and community colleges as well as sheltered workshops for the disabled.[75]

Public housing tenants also can qualify for the mandatory delay in rent increase if they have been "previously unemployed" for at least 12 months prior to beginning a job. The final regulations retain the proposed definition of "previously unemployed" as earnings of no more than 500 hours at the "established" minimum wage.[76] In the preamble, HUD clarifies that the "established" minimum wage is the higher of the applicable state or federal minimum wage.[77] In addition, HUD reiterates that the pre-existing 18-month disregard for those whose earnings increase after participation in certain government-funded training programs continues to apply to those who qualified for it prior to October 1, 1999.[78] As the provision of the regulations governing the 18-month disregard is deleted by the final rules,[79] advocates will have to be watchful that PHAs properly award the prior disregard to qualifying families over the next year.

HUD chose a four-year period in which the income disregard could apply for each family member, rather than the two-year duration of the disregard itself, to allow for changes in jobs and periods of unemployment.

PHAs are permitted to offer tenants who qualify for the mandatory delay in rent increase the alternative of paying the rent otherwise due and putting the increased rent payments in a savings account. A serious concern in the proposed regulations was a provision that would have allowed PHAs to refuse to release such savings to a family if the family moved out of public housing when it was in breach of its lease. The final regulations provide that a PHA may only retain the amount of the savings equal to any amounts owed to the PHA,[80] and the preamble clarifies that this standard applies even if the family is evicted by the PHA.[81]

Other Rent Issues for Public Housing and Section 8 Tenants

Rent reductions for public housing and voucher tenants whose welfare grants have been cut. The final regulations provide answers to several issues left unresolved by the proposed rules concerning which families are subject to the new statutory provision prohibiting PHAs from reducing the rents of public housing or certificate/voucher tenants who lose in-

[67] *Id.* § 960.255(b).

[68] *Id.* § 960.255(a).

[69] 65 Fed. Reg. 16,704 (Mar. 29, 2000).

[70] 24 C.F.R. § 960.255(a)(definition of "qualified family, " ¶ (iii)).

[71] *Id.*

[72] *Id.*

[73] *Id.* § 960.255(a) (definition of "qualified family," (ii)) .

[74] 65 Fed. Reg. 16,705 (Mar. 29, 2000).

[75] *Id.*

[76] 24 C.F.R. § 960.255(a) (definition of "qualified family," ¶ (i)).

[77] 65 Fed. Reg. 16,704 -16,705 (March 29, 2000).

[78] *Id.* at 16,705. The applicable regulations that were removed can be found at 24 C.F.R. § 5.609(c)(13) (1999).

[79] 65 Fed. Reg. 16,716 (Mar. 29, 2000) (¶ 20(a), removing and reserving § 5,609(c)(13)).

[80] 24 C.F.R. § 960.255(d)(6).

[81] 65 Fed. Reg. 16,705 (Mar. 29, 2000).

come due to a reduction in welfare benefits.[82] The final rule is clear that the prohibition on rent reduction applies only when welfare benefits are reduced in whole or in part due to noncompliance with a welfare agency requirement to participate in an "economic self-sufficiency program," as that term is defined *by HUD*, as well as due to fraud.[83] The prohibition does not apply when the loss of welfare benefits is due to a "lifetime or other" time limit.[84] Consequently, noncompliance with common welfare agency requirements such as child support cooperation or children's school attendance or immunization does not alter the usual rule that a family's rent must be reduced within a reasonable time of its request due to reduced income.[85] In addition, the prohibition is now clearly limited to families that reside in public housing or receive Section 8 tenant-based assistance at the time of the welfare agency sanction.[86] Thus, a family admitted to either program after the welfare benefit reduction or termination has occurred would have its rent obligation determined under the usual rules.

Noncompliance with common welfare agency requirements does not alter the usual rule that a family's rent must be reduced within a reasonable time of its request due to reduced income.

The final rule on so-called "sanction rents" clarifies the duration of the prohibition on rent reduction and its interaction with the usual rules for counting increases in other income. If the welfare agency sets a finite term for the welfare sanction, the PHA must impute the amount of the welfare benefit reduction as part of the family's annual income only during the term of the sanction.[87] For example, if a welfare agency reduces (or terminates) a family's TANF grant for a period of 60 days due to noncompliance with a work requirement, and at the end of the sanction period the family does not reapply for benefits, for whatever reason, the family is entitled to a redetermination of its rent based on its actual income at the close of the sanction period. If a family's income from another source increases during the applicability of the "sanction rent rule" and exceeds the imputed income from the welfare benefit reduction or termination, the imputed income is reduced to zero.[88] Presumably, if the family's income goes down after that point it would be entitled to a rent reduction under the usual rules, even if the welfare agency had imposed a lifetime sanction.[89]

The implementation of the "sanction rent" rule by PHAs raises some new issues due to the interdependency of PHA and welfare agency time lines and administrative practices. Advocates are likely to be disappointed in the failure of the final rule to provide clear answers on two important "intersection" questions. While the rule states that a PHA can only deny a rent reduction based on a welfare agency's written notice specifying that the reduction or termination of welfare benefits is due to fraud or noncompliance with an economic self-sufficiency program requirement,[90] it is silent on how long a PHA can wait to act on a family's request for a rent reduction pending receipt of such a notice from the welfare agency. It will be up to tenants and their advocates to argue what is a "reasonable" time to wait.[91] The PHA plan process is one vehicle to establish a clear PHA policy on this issue. The cooperation agreement that PHAs must use their best efforts to develop with welfare agencies is another potential vehicle to establish clear time frames for PHA and welfare agency actions.[92]

The second issue is the interaction of welfare agency and PHA hearings concerning the welfare sanction. The final rule makes clear that the scope of a PHA hearing is limited to whether the welfare agency's written notice sets forth a reason for the reduction or termination of welfare benefits that justifies the PHA's decision not to reduce the rent as requested, and whether the PHA imputed the correct amount of income to the family based on the notice.[93] Any challenge to the propriety of the welfare agency's decision to reduce or terminate welfare benefits must be raised at the welfare agency.[94] By careful wording, the final rule permits but does not require PHAs to suspend the imputing of welfare in-

[82] 42 U.S.C.A. § 1437j(d) (West Supp. 1999).

[83] 24 C.F.R. § 5.615(b) (definition of "Specified welfare benefit reduction"). The definition of "economic self-sufficiency program" is found at 24 C.F.R. § 5.603(b). The preamble contains an ambiguous HUD response to a comment implying that fraud must be a criminal, not a civil offense. HUD states that it is up to the state or local welfare agency to determine when a family has committed fraud, but is silent regarding what a PHA should do if the welfare agency uses a different but similar term in its regulations, such as "intentional program violation." 65 Fed. Reg. 16,706 (Mar. 29, 2000).

[84] 24 C.F.R. § 5.615(b) (definition of "Specified welfare benefit reduction," ¶ 2(i)).

[85] *Id.* § 982.516(b)(2)(vouchers and certificates); *Id.* § 960.257(b)(public housing).

[86] *Id.* § 5.615(c)(5).

[87] *Id.* § 5.615(c)(3).

[88] *Id.* § 5.615(c)(4).

[89] Six states (Delaware, Georgia, Idaho, Mississippi, Nevada, and Pennsylvania, and possibly Wisconsin) currently impose lifetime sanctions against the entire family after a parent has repeatedly failed to comply with work requirements. U.S. General Accounting Office, Welfare Reform: State Sanction Policies and Number of Families Affected, GAO/HEHS-00-44, Appendix II at 44-46 (March, 2000).

[90] 24 C.F.R. § 5.615(c)(1).

[91] *See* n. 85 *supra.*

[92] 65 Fed. Reg. 16,707 (Mar. 29, 2000).

[93] 24 C.F.R. § 5.615(e)(2).

[94] *Id.* § 5.615(e)(3).

come while the family pursues its appeal rights "through the welfare agency's normal due process procedures."[95]

Minimum rents. The only noteworthy improvement in the final rule concerning minimum rents is the addition of a provision specifying that the hardship exemption for loss of eligibility for a federal, state or local assistance program includes a family with a member who is a noncitizen lawfully admitted for permanent residence who would be entitled to public benefits but for the 1996 welfare legislation.[96]

The final regulations retain the complicated system for determining when the statutorily mandated hardship exemptions to the minimum rent are temporary or long-term.[97] HUD declined to establish a bright-line rule that any hardship lasting more than 90 days was long term, leaving the determination of whether a hardship is temporary up to each PHA and private owner.[98] (If a hardship is determined to be temporary, the family must repay the suspended minimum rent under a reasonable repayment agreement.[99]) The statute and the regulations provide a hardship exemption for a family that would be evicted because it is unable to pay the minimum rent.[100] But HUD avoided providing a clear answer to the question of whether a family's inability to pay the amounts required under a repayment agreement concerning suspended minimum rents affects the PHA's or owner's right to evict the family for non-payment if the family is no longer in minimum-rent status.[101] The final rule requires both PHAs and private owners of project-based Section 8 units to suspend any minimum rent beginning the month following a family's request for a hardship exemption until it is determined whether the hardship is temporary or long-term.[102]

HUD chose to maintain the requirement that private owners impose a minimum rent of $25 per month, declining to permit private owners to exercise any discretion.[103] HUD also declined to add specific notice obligations to the regulations, or any requirement that PHAs adopt procedures to prevent the eviction of a family in minimum-rent status.[104] For public housing tenants and participants in the PHA's tenant-based program, the PHA's obligations to notify families of their potential eligibility for hardship exemptions to the minimum rent could be specified in the PHA plan. Of course, the plan process will not help project-based Section 8 tenants.

HUD declined to establish a bright-line rule that any hardship lasting more than 90 days was long term, leaving the determination of whether a hardship is temporary up to each PHA and private owner.

Public Housing Community Service Requirement

The final rules clarify some of the implementation questions raised by the new requirement that adult public housing tenants, other than those who are exempt, participate in community service or an economic self-sufficiency activity for eight hours per month.[105] Many issues, however, are left to PHAs to determine in their local community service policy. This policy is a required component of the PHA Plan, except for those agencies permitted to file a streamlined plan.[106] PHAs must implement the community service requirement—and include their community service policy in the PHA plan—beginning with the first date of their fiscal year that begins on or after October 1, 2000.[107]

Most public housing tenants are likely to be exempt from the community service requirement. HUD made the exemption process easier for blind and disabled individuals by permitting them to self-certify "that because of this disability she or he is unable to comply" with the community service requirement.[108] With regard to the two somewhat confusing statutory exemption categories that depend on the family's status under TANF or similar state welfare program,[109] HUD made no changes in the regulations but added some clarifying comments in the preamble. PHAs are not required to make their own determination whether an adult meets the

[95] *Id. See* Barbara Sard, The Importance of Issues at the Intersection of Housing and Welfare Reform for Legal Services Work, 33 Clearinghouse Review 502 (Jan.-Feb. 2000) for a discussion of implementation issues concerning "sanction rents" as well as some of the other rent issues discussed in this article.

[96] 24 C.F.R. § 5.630(b)(1)(i).

[97] *Id.* § 5.630.

[98] 65 Fed. Reg. 16,704 (Mar. 29, 2000).

[99] 24 C.F.R. § 5.630(b)(2). The rule uses somewhat different wording for how temporary hardships are to be treated for public housing and Section 8 tenants. It is not clear whether the difference in wording will amount to a real difference.

[100] *Id.* § 5.630(b)((1)(ii); 42 U.S.C.A. § 1437a(a)(3)(B)(i)(II) (West Supp. 1999).

[101] 65 Fed. Reg. 17,704 (Mar. 29, 2000).

[102] 24 C.F.R. §§ 5.630(b)(2)(i)(A) and (ii)(A).

[103] *Id.* § 5.630(a)(3); 65 Fed. Reg. 16,703.

[104] 65 Fed. Reg. 16,703-16,704 (Mar. 29, 2000).

[105] 42 U.S.C.A. § 1437j(c) (West Supp. 1999); 24 C.F.R. § 960.600 *et seq*.

[106] 24 C.F.R. §§ 903.7(l)(iii), 903.11. The latter regulation includes the requirement that PHAs submitting streamlined plans must inform the public how information on the omitted policies may reasonably be obtained. 24 C.F.R. § 903.11(b). Presumably the reason for this requirement is to facilitate public comment.

[107] 24 C.F.R. § 960.600.

[108] *Id.* § 960.601 (definition of "Exempt individual" ¶ (2)(i)).

[109] 24 C.F.R. § 960.601 (definition of "Exempt individual" ¶¶ (4) and (5)).

criteria for being exempted from a work requirement under a state welfare program, but rather are to obtain information from the welfare agency concerning its exemption determination.[110] For adults in families that receive TANF or other welfare benefits who are not exempt from work requirements, a PHA may require verification either of affirmative compliance with the welfare agency's work requirements or of the absence of a work-related sanction.[111] In many states it will be easier for families to obtain verification of the lack of a current sanction (for example, by showing that they are receiving the full amount of welfare benefits for their family size) than it will be to provide welfare agency verification of actual compliance with work requirements. HUD declined to add to the regulations a process that PHAs must follow in determining the exemption status of adult family members; it is up to each PHA to adopt a community service policy that includes a description of the exemption process, including how the PHA will deal with requests to change exemption status during the annual lease term.[112] Written notice of the service requirement and the exemption process must be given to each *family* rather than to *all residents* as the proposed rule had stated.[113]

Concerning what PHAs must do to implement the community service requirement for adults who are not exempt, the preamble states that PHAs are not obligated to establish community service activities; they may simply provide residents with a list of acceptable activities and ways to contact various groups that sponsor them.[114] HUD deleted from the final regulations the requirement that PHAs provide residents with advance approval of their planned activities, although the preamble states a number of reasons why such an advance approval mechanism would be desirable.[115] Finally, HUD states that PHAs are not required to involve resident councils in the administration of the community service requirement, but are encouraged to do so where such involvement would be effective.[116] If tenants wish to have the PHA sponsor community service activities, involve their resident council in the community service program, or have the PHA establish an advance approval mechanism for residents' proposed activities, they will need to advocate for the PHA to adopt such policies during the PHA plan or other process.

The final rule adds a provision clarifying that a resident may combine hours s/he spends in an economic self-sufficiency program with community service hours to meet the eight hours per month requirement.[117] The preamble states that PHAs may permit residents to verify that they have contributed the requisite total hours at some point during the year, rather than requiring that time be spent each month.[118] The regulations now state that it is the responsibility of each non-exempt adult to provide third-party verification of performance of qualifying activities, unless the resident has participated in a program administered by the PHA.[119]

In the case of alleged noncompliance by a non-exempt adult with the community service requirement, the final regulations require the PHA to notify the *tenant*, rather than the noncompliant resident, of the alleged noncompliance. The notice must also describe the cure process, and inform the tenant that the lease will not be renewed unless an agreement is signed by both the tenant and the noncomplying family member specifying how the noncompliance will be cured or that the noncomplying adult has moved out of the unit.[120] In addition to specifying that the PHA's determination of noncompliance with the community service requirement is subject to the PHA's grievance process, the final rule also states that "the tenant may exercise any available judicial remedy to seek timely redress for the PHA's nonrenewal of the lease because of such determination."[121]

Family Self-Sufficiency Program

The final rules implement the proposed narrowing of the definition of "welfare assistance," and improve on the proposed rule by stating explicitly what types of benefits and services are excluded. Parents who have completed their Family Self-Sufficiency (FSS) contract and obtained employment will be able to receive their escrow funds even if the parent or another family member receives benefits or services such as Food Stamps, SSI, any health care or child care assistance, refundable earned income tax credit payments, short-term non-recurrent TANF-funded benefits, or a broad range of work-related or supportive services.[122] In addition, HUD revised the final rules to permit PHAs to receive reimbursement for the reasonable administrative costs of a voluntary FSS program as well as the reasonable costs attributable to serving families above the mandatory number of participants.[123] ■

---

[110] 65 Fed. Reg. 16,711 (Mar. 29, 2000).

[111] *Id.*

[112] 24 C.F.R. § 960.605(c)(1); 65 Fed. Reg. 16,711 (Mar. 29, 2000).

[113] *Id.* § 960.605(c)(2).

[114] 65 Fed. Reg. 16,709 (Mar. 29, 2000).

[115] *Id.* Advance approval would have been required by proposed 24 C.F.R. § 960.605(c)(3).

[116] 65 Fed. Reg. 16,710 (Mar. 29, 2000).

[117] 24 C.F.R. § 960.603(a)(3).

[118] 65 Fed. Reg. 16,709 (Mar. 29, 2000).

[119] 24 C.F.R. § 960.607(a).

[120] *Id.* § 960.607(b).

[121] *Id.* § 960.607(b)(2)(iii).

[122] *Id.* § 984.103(b)(definition of welfare assistance). Apparently HUD intends to issue guidance clarifying to whom the revised definition will apply. 65 Fed. Reg. 16,712.

[123] 24 C.F.R. § 984.302(a)(deletion of phrase "the minimum program size"). *See* 65 Fed. Reg. 16,898 (Mar. 29, 2000).

HUD PROPOSES TO IMPLEMENT INCOME VERIFICATION PROGRAM FOR TENANTS IN ASSISTED AND PUBLIC HOUSING

HUD has been working on a computer matching and tenant income verification program. The initial phases compared the income data that HUD received on behalf of participants in HUD-assisted housing programs with the income data reported to other federal agencies, including the Internal Revenue Service (IRS) and the Social Security Administration (SSA). As discussed below, there have been various explanations of the purpose and justification for the program. HUD now appears to be ready to implement the beginning stages of the income-verification aspect of the program. The agency announced that it was going to send approximately 280,000 letters to selected assisted-housing tenants and participants[1] informing them of discovered discrepancies for the 1998 calendar year between the income for the tenant that HUD obtained and the income reported to IRS or SSA.

Tenants and tenant advocates who have heard about the program[2] have been making efforts to stop or slow down the process to ensure that it is fair and reasonable, that the statutory requirements are met, and that innocent tenants are not intimidated or threatened with loss of their homes. They have made substantial progress in their attempts to get HUD to focus on and resolve some of their concerns and to revise the Income Verification Program accordingly. The following provides a brief background on what is happening and what advocates can expect in the future.

Income Matching. HUD conducted computerized matches of income for participants in assisted housing pursuant to the Computer Matching and Privacy Protection Act of 1988, as amended.[3] It obtained information on unearned income from IRS and earned income from SSA. That data was then compared with the tenant income that Public Housing Authorities (PHAs) and Owners/Agents, collectively referred to as POAs, report to HUD.

HUD states that the primary purpose of the program is to increase the availability of subsidized units to those who meet the requirements of the program. Other objectives include a determination of the appropriate level of tenant subsidies, identification and recovery of excessive housing assistance, and a deterrence of future abuse of the housing programs.[4]

For the 1995 and 1996 calendar years, HUD conducted limited income matches for approximately 1,000 tenants as well as an unknown number of tenants of selected PHAs and project owners. According to HUD, these matches apparently revealed that there was under-reporting of income by some tenants. These limited matches resulted in some tenants moving and others agreeing to repay excessive rental assistance.[5] Significantly, in its proposed budget for fiscal year 2001, HUD projected from this sampling that the excess rental subsidies when applied to the entire universe would total as much as hundreds of millions of dollars.[6] Without further explanation, HUD then projected an $80 million saving for fiscal 2001 as a result of the matching effort.[7]

Income Verification Program. Under the Income Verification Program, as currently proposed, HUD informs tenants of income discrepancies for 1998 and the POAs verify the income for those selected tenants. After verification, a POA takes the action that is consistent with its normal procedures to collect excessive rental subsidies or suspend or terminate assistance.[8]

HUD announced that the threshold for the income discrepancies is $8,000 for a public housing tenant and Section 8 tenant-based participant and $4,000 for a subsidized project-based tenant. Thus, it is anticipated that tenants will not receive letters if the income discrepancy is smaller than the applicable threshold. The reason given by HUD for the distinction between the two groups of tenants is that many PHAs do not require interim reporting of income, whereas subsidized project-based tenants must report changes in income of $40 or more per month. Because of the different reporting requirements, it is highly probable that many public housing tenants would have income discrepancies in any given year.

---

[1]HUD anticipates sending letters to 277,813 individuals who reside in 205,702 households. Of that amount, 94,175 will be sent to residents of public housing and participants in the tenant-based Section 8 program and 111,527 to subsidized project-based tenants.

[2]The National Association of HUD Tenants (NAHT), Public Housing Residents Organizing Campaign, National Low Income Housing Coalition, NHLP and many other legal services advocates and tenant organizations have worked hard to gather information and present the case to HUD. In addition, there have also been several newspaper articles on the subject of the Income Verification Program. *See e.g.* "Many Tenants in Subsidized Housing Suspected of Under Reporting Income" Michael Grunwald, Washington Post, March 24, 2000 and "HUD Seeks Repayment of Subsidies" Cleveland Plain Dealer, Friday, March 31, 2000.

[3]42 U.S.C. § 3544; *see also* 26 U.S.C. § 6103(l)(7)(D)(ix) (sets forth guidelines for disclosure of tax return information to HUD officials and Matching Agreement Between IRS and HUD for Disclosure of Information to Federal, State and Local Agencies (DIFSLA—Tax Years 1994-1995) (Renewal date May 19, 1997).

[4]63 Fed. Reg. 68,131 (Dec. 9, 1998) (Privacy Act of 1974; Notice of Matching Program: Matching in Assisted Housing Programs).

[5]*Id.*

[6]The Budget for Fiscal Year 2001, Public and Indian Housing, page 483.

[7]*Id.*

[8]As discussed *infra,* HUD is now committed to encouraging POAs not to collect rent that may be due because of past improper reporting. Thus these punitive measures may no longer be applicable.

Although HUD is authorized to conduct the income matching, it is prohibited from disclosing to POAs any tax information that it receives as a result of the match.[9] However, it is HUD's position that it may reveal to the POAs the fact that a discrepancy exists and request that POAs reverify a tenant's income.[10]

The income-matching statute provides that information received by HUD or a POA that is adverse to the tenant cannot be used to deny, reduce or terminate the housing subsidy until the POA independently verifies the amount reported and determines whether the tenant or applicant had access to the funds for his or her personal use. In addition, the tenant must be given the opportunity to contest any adverse determination made by the POA or HUD.[11]

Apparently to overcome the prohibition against HUD or POA disclosure of protected tax information, the Quality Housing and Work Responsibility Act of 1998 (QHWRA) amended Section 3 of the United States Housing Act to require most assisted-housing tenants to disclose to the POAs information received from HUD regarding income, earnings, wages or unemployment compensation.[12] Significantly, Congress also simultaneously amended section 904 of the Stewart B. McKinney Homeless Assistance Amendment Act of 1988 to provide that a tenant may be required to sign an agreement by which the tenant consents to provide to the POA the income matching information that HUD provides to the tenant.[13] In the same legislation, Congress provided for the imposition of misdemeanor penalties and fines upon HUD or POA officials who "wilfully request . . . any information concerning an applicant or participant pursuant to the authority contained in . . . section 6103(l)(7)(D)(ix) of title 26 . . .without consent *or agreement*, as *applicable* . . . "[14] Presumably, Congress added these provisions because any use or release of tax information for purposes other than tax collection is severely restricted.[15]

The recently published final rule on Admission and Occupancy implements the statutory requirement that the family must disclose to the POA the information that HUD provides to the tenant or a member of a tenant's household regarding the income matching. Significantly, the regulations are silent on the issue of a tenant's right to have a signed agreement with the POA prior to being obligated to release the HUD-generated income matching information. The regulations are not helpful on the question of the liability of a POA that requests information without such an agreement.[16] Nor do the final regulations make any mention of the statutory requirement regarding verification of tenant access to and personal use of the income.

The income-matching statute provides that information that is adverse to the tenant cannot be automatically used to deny, reduce or terminate the housing subsidy.

Income Discrepancy Resolution Guide. In preparation of implementation of the Income Verification Program, HUD published a Draft Income Discrepancy Resolution Guide.[17] The provisions in the Guide are outlined below. These provisions may be subject to change due to the concerted efforts of tenants and their advocates.

The Guide states that HUD was motivated by the HUD Office of Inspector General (IG), which identified weaknesses in HUD's annual financial statements, to commence the Income Verification Program. The Guide describes a program whereby HUD's Real Estate Assessment Center (REAC) will send a letter to a tenant or a member of a tenant's household for whom an income match was made and a discrepancy noted.[18] HUD will then notify POAs of the names of the tenants or household members to whom HUD sent letters. HUD will not disclose the income discrepancy to the POA. The POA is then expected to follow up with the tenant or household member. If the tenant or household member does not respond to the HUD-generated letter or claims not to have received the letter from HUD, REAC will send at least two follow-up letters. If the tenant fails to respond to the POA's follow-up efforts (i.e., fails to meet with the POA or sign forms), the POA is instructed to institute termination proceedings as appropriate.[19] POAs are cautioned to fully document all tenant contact because "legal action may be required as a result of the tenant contact."[20] Moreover, POAs are also instructed to take administrative action only after all discrepancies for a household are resolved.[21]

[9]63 Fed. Reg. 68,131 (Dec. 9, 1998); 65 Fed. Reg. 16,699 (Mar. 29, 2000).

[10]63 Fed. Reg. 68,131 (Dec. 9, 1998).

[11]42 U.S.C.A. § 3544(c)(2)(B) (West Supp. 1999).

[12]42 U.S.C.A. § 1437a(f) (West Supp. 1999). Tenants required to disclose the information include: public housing tenants, Section 8 tenants and participants and Section 811 and 202 tenants. Rent Supplement and Section 236 tenants are not required to disclose the information. Note, however, that HUD includes rent supplement and Section 236 Rental Assistance Program participants in the Income Verification Program. *Income Discrepancy Resolution Guide*, Version 1.0, Release 1.3 (Mar. 2, 2000), at page 1. (hereafter referred to as "Guide"). The Guide is available on the Internet at: www.hud.gov/reac/products/tass/tass_doc.html.

[13]Pub. L. 105-276, § 508(d)(2) codified at 42 U.S.C.A. § 3544 (West Supp. 1999).

[14]42 U.S.C.A. § 3544(c)((3)(A) (West Supp. 1999) (emphasis added).

[15]For example, the consent forms that tenants and applicants sign to authorize HUD to conduct income matches with IRS and SSA may not be used to request taxpayer return information. 42 U.S.C. § 3544(b) (West Supp. 1999).

[16]24 C.F.R. § 5.234 states that "the restrictions of 42 U.S.C. 3544(c)(2)(A) and of 26 U.S.C. 6103(l)(7) apply to the use by HUD or a [PHA] of income information obtained from the IRS or SSA." The regulation fails to notify owners and agents of these restrictions and provides no explanation of the import of the statute.

[17]*See* note 12, *supra*.

[18]Some households will receive more than one letter. *See* note 1, *supra.* HUD also contemplates that some income discrepancy letters will be sent to tenants who are not head of households.

[19]Guide page 8.

[20]Guide page 6.

[21]*Id.*

The Guide (which as noted may be changed) provides instruction to the POA for a variety of situations—for example, if the tenant responds, does not respond, responds and has no information, etc. Once the POA receives the federal tax data, via either the tenant disclosing the letter or the POA receiving the information directly because the tenant signed IRS forms releasing the information, the POA and tenant are to meet to resolve differences. If, after the meeting, differences remain, they must be verified. However, verification is only required for discrepancy income that is not required, by regulations or otherwise, to be excluded from the ordinary calculation of "income."[22] For example, the Guide mentions that a discrepancy in foster care or lump sum additions to family assets must be excluded from income for purposes of the Income Verification Program.

The Guide sets forth a complicated process for resolution of rent discrepencies. For tenants with verified or undisputed increases in income, the POA must determine the month in which the income was received and prepare a month-by-month comparison between rent charged and the rent that should have been charged. The procedure whereby PHAs make the calculation will vary depending upon the rules adopted by the PHA. For example, some PHAs do not require interim reporting, others delay implementation of any rent increase for 30 or 60 days, and others require that changes be reported but do not require a change in rent. For subsidized project-based tenants the rules are all the same: tenants are required to report immediately any changes in income in excess of $40 per month, changes in family size, and if any previously unemployed member becomes employed.[23] The worksheets for the income calculations and monthly rent calculations are set forth in Appendix D of the Guide.

It is apparent in reviewing the proposed Income Verification Program that problems will arise. One very serious problem is the treatment of exclusions from income.[24] First, POAs and tenants will not be aware of all the applicable exclusions from income. HUD mentions some of the exclusions from income in the Guide—for example, employment of children under the age of 18, lump-sum additions to family income, income received under certain types of training programs, and sporadic income.[25] The Guide also cross-references the Code of Federal Regulations, the Federal Register and a HUD Notice where the exclusions from income are listed.[26] However, the list of applicable regulations is incomplete. For example, HUD Handbook 4350.3, *Occupancy Requirements of Multifamily Subsidized Housing Programs*, App. 3-5 (June 1992), which also lists exclusions, is omitted.

Second there are exclusions that are mandated by the income-matching statute that have not been implemented. In particular, 42 U.S.C. § 3544 provides that the POA must verify whether the tenant had "access" to the income for "his or her own use." To give effect to this requirement, the statute must be interpreted to mean that there is no discrepancy when it arises from income that was not received and not used by the tenant. For example, the amount of garnished wages, the income to a trust over which the tenant had no control, or income that was usurped by another (as may be the case in an elder abuse situation), should be excluded from income.

For tenants with verified or undisputed increases in income, the POA must determine the month in which the income was received and prepare a month-by-month comparison between rent charged and the rent that should have been charged.

Third, there is the issue for public housing tenants of the earned income disregard which was mandatory but which has not been universally implemented by PHAs.[27]

Finally there is the question of regulation interpretation; many of the rules regarding exclusions from income are subject to varying interpretations. For example, the published rule states that "annual income does not include...sporadic income,"[28] but does not make a distinction between earned and unearned sporadic income. Nevertheless, the Guide goes beyond the published regulations and states that the "sporadic income rule does not apply to unearned income."[29] Such a unilateral amendment of the published rule is not permissible. If HUD wants to change the published regulations, it must follow its own regulations and the APA and make the change after publication by notice and comment. At a minimum, the tenant should not be penalized if he or she or the POA did not interpret the regulation in 1998 in

[22] *See* discussion *infra* regarding exclusions. *See also* 24 C.F.R. § 5.609(c) (which sets forth some exclusions). Some of the more generally used exclusions include: the income of children under 18 years, payments received for the care of foster children, lump-sum additions to family income, and (for public housing tenants) the earned-income disregard.

[23] *See* Model Lease for Subsidized Programs, ¶ 16.

[24] This is one of the issues that HUD has agreed to address, see discussion *infra*.

[25] Guide at page 12.

[26] 24 C.F.R. § 5.609(c) and 58 Fed. Reg. 41,287 (Aug. 3, 1993) (Federally Mandated Exclusions From Income) also issued as PIH 93-65, Benefits Exempted from Annual Income by Federal Law (issued December 13, 1993, expired December 31, 1994).

[27] See the NHLP website for a discussion of the income disregard in effect for the 1998 calendar year: http://www.nhlp.org/pubhsg/phinfopkt.htm. For the income disregard rules effective October 1, 1999, see 42 U.S.C. § 1437a(d); 24 C.F.R. § 960.255, 65 Fed. Reg. 16,819 (Mar. 30, 2000) and the discussion of the issue in *Final Admission and Occupancy Regulation Issued* appearing in this issue of the *Bulletin*.

[28] 24 C.F.R. § 5.609(c)(9).

[29] Guide at page 14 and Appendix D, ¶ 5.

the same manner that HUD is currently proposing. Issues of misinterpretation of the regulations will undoubtedly be exacerbated at the local level.

Another serious problem is that the Guide, as currently drafted, instructs POAs to follow normal procedure and suspend, terminate or reduce housing assistance if such action is warranted after verification. Egregious situations may be referred to the IG. In addition, POAs are cautioned to record all contacts with the tenant, as the information may be used in a court proceeding. Yet tenants are not informed of these potentially serious consequences. They should be, even though such warnings may interfere with the verification process.

Tenants and POAs will also encounter problems when the POA has not retained or cannot find the tenant file, a not infrequent occurrence particularly when there has been a change in management. Without the file, the POA will not be able to verify whether the tenant reported the income, an element of a determination that the tenant identified with a discrepancy is a false positive. A false positive distinction is important because when there is a false positive the tenant's income need not be verified. The problem with missing files is most likely to occur for subsidized project-based tenants who tend to experience frequent changes in management.

Tenants will also experience problems when the person informed of the income discrepancy is someone other than the head of household. The Guide anticipates that the POA will notify the head of household if the other member of the household fails to respond to the notices. But it is quite possible that the head of household was unaware of the income received by the other member of the household. The Guide is unclear as to what the POA must do in that situation, but the statute provides some guidance. The POA must at a minimum establish that the tenant had access to the income for his or her own use. That language may be helpful to prevent the termination of the housing subsidy or eviction of an innocent tenant who had no knowledge of, access to, or use of the income received by the other member of the household.

To further confuse the process, the data that HUD used to conduct the match will most likely *not* agree with the data in the POA files. The data will be different because HUD annualized the information provided by the POA so that it could be matched to the 1998 tax information. What this means in practice is that a POA and tenant will have to review information provided and verifications conducted in both calendar year 1997 and 1998 to determine if 1998 income was reported and how 1998 rent was established.[30]

As the above list of problems makes clear, the verification process will be time consuming and complicated.

HUD acknowledges that the income verification process may result in certain situations that will be determined to be a false positive. If there is a determination of a false positive, HUD instructs that the verification of tenant income should not be pursued and discrepancies need not be resolved. False positives may occur in the following situations:

- tenant who paid ceiling rent or a flat market rent;[31]
- tenant who is no longer a resident of the POA;[32]
- tenant who was not a tenant for the full 1998 calendar year;[33]
- POA identified the discrepancy prior to HUD notification;
- tenant was not required to report changes in income based upon POA policy and rental assistance was correct for all of 1998;
- tenant reported income and there was no interim rent increase required based on POA policy;
- tenant reported income but HUD data does not agree with POA data;
- tenant income excluded based on program requirements;[34]
- income discrepancy less than $1,000;[35]
- tenant reported all income affecting the 1998 rental assistance;[36]
- no discrepancy exists.

Attached to the Guide are draft letters HUD proposes that POAs send to tenants or heads of households to follow up when the tenant fails to meet with the POA, and a draft letter of termination for failure of the tenant or household member to contact the POA or turn over the HUD-generated letter, etc. It is anticipated that these letters will be revised in the manner that the initial letter to the tenant is currently being revised—with the input of the tenants and their advocates.

The Guide anticipates that the POA will conduct all the

[30]Guide at 12.

[31]Guide at 10. There is no provision on the electronic tracking form for a tenant with this type of false positive. *See* Guide at 36. The Guide and forms must be changed to correct this error.

[32]However, the Guide encourages a POA to utilize its normal procedures for discrepancy resolution and possible recovery of excess rental assistance, if the tenant vacates a unit prior to or after the POA contact. Guide at 7. *See also* 65 Fed. Reg. 16,699 (Mar. 29, 2000) (comments to the Admission and Occupancy regulations mention that a POA could pursue tenants who have moved, but recognize that the statutory language for the income matching program is limited to current participants).

[33]The Guide provides that the POA must fill out a form for each tenant with a discrepancy so that the term tenant is not limited to head of household. Guide at 10.

[34]*See* discussion in text, *supra* regarding exclusions from income.

[35]Guide at page 15 (valid income discrepancy defined as $1,000 or more). HUD is currently proposing to send letters to those tenants with an income discrepancy of $4,000 for a project-based tenant and $8,000 for a PHA or a Section 8 tenant-based participant. In the on-going negotiations with HUD over the implementation of the Income Verification Program, one of the issues to be resolved is whether the threshold for sending letters should also be adopted for determining if there is a false positive.

[36]The Guide is confusing on this issue. One form allows a false positive only if the income was reported *and* either no interim increases were required or the HUD and POA data differ. Guide at 36. The directions for the Income Comparison Worksheet provide that the sheet shall not be completed if the tenant reported all income consistent with program POA guidelines. Guide Appendix D, ¶ 2. Presumably, if this latter form is not completed the verification of income will stop, which is, or should be, the equivalent of a false positive.

required verifications and provide the tenant with the opportunity to contest any findings consistent with the existing procedures of the POA.[37] Section 3 of the Guide summarizes the administrative and legal actions that a POA may take to obtain repayment of excess rental assistance, reduction in benefits and/or termination of benefits, including eviction.[38] POAs are given the option of entering into repayment agreements or prospectively increasing tenant rent to the HUD-approved ceiling rent or market rent. Reference also is made in this section to the fact that POAs may keep certain percentages of the amount of recovered excess rental assistance.[39] Finally, there is a reference to the referral for investigation to the IG for egregious cases.

Tenants and Tenant Advocates Object to the Income Verification Program. Tenants and tenant advocates strenuously objected to the HUD-proposed implementation of the Income Verification Program. They raised questions regarding the need for rule-making, due process and procedural safeguards, literacy/language barriers, the necessity to address the special needs of disabled and elderly individuals and families, the need for full and complete information, and potential administrative burdens. The advocates also provided HUD with a summary of some of the legal issues presented by the proposed Income Verification Program. These included:

- a potential violation of the QHWRA requirement that there be tenant agreements in effect before tenants can be required to give the HUD letters to POA;
- potential federal and state law privacy act[40] violations;
- the need for rule-making;
- the need for Fair Housing and Equal Opportunity Act reviews,
- the obligation that HUD has to fully inform POAs of the income disregards (especially the earned-income disregard); and
- potential violation of the tax code.[41]

As a result of the pressure marshaled by the tenant groups and tenant advocates, HUD has agreed to address some of these issues. In particular, Deputy Assistant Secretary Saul Ramirez agreed to the following:

- HUD would provide to the tenants and their advocates for comment and review copies of the proposed letters to be sent to the tenants and POAs;
- HUD would not seek nor would it encourage POAs to seek retroactive adjustment to rent as a result of the Income Verification Program;[42]
- POAs would not financially benefit if they sought to retroactively adjust a tenant's rent as a result of the Income Verification Program;
- POAs and tenants would be told of the income disregards—especially the earned income disregard for public housing tenants—applicable to income received in calendar year 1998;
- HUD will modify the Guide to address issues unique to the elderly; and
- correspondence that is sent to tenants will have information regarding the availability of translations into at least six languages.[43]

HUD has stated that it is not willing to go through a notice and comment period. It is also firm in its commitment to refer egregious abuses to the IG for fraud investigation.[44] Significantly, however, HUD has agreed to quickly put into place a program to identify and rectify cases of tenant overpayment. Saul Ramirez also agreed that staff at the local HUD offices will be instructed to act as ombudsmen for the subsidized housing tenants as they have no access to formal and impartial grievance procedures.

Negotiations regarding the final shape of the Income Verification Program are still in progress. There remain many issues that still must be resolved, including:

- The steps HUD will take to encourage POAs to take no action against a tenant with income discrepancies other than adjusting rent prospectively to account for the current income.
- Creation and dissemination of comprehensive listing of income disregards to be used in the verification process.
- The steps HUD must take to ensure that POAs do not receive income from the pursuit of tenants to collect back rent as a result of information disclosed during the income matching and verification program.
- Determination of the standards that will be used to refer an egregious situation case to the IG.
- Changes that must be made to the Guide to implement the agreements outlined above.
- Steps that need to be taken to implement the program to determine and rectify tenant over payments. ■

[37]Nowhere in this section is there any mention of the requirement that the POA determine whether the tenant had access to or personal use of income. *See* 42 U.S.C. § 3544(c)(2(B)(ii).

[38]Guide at 17-21.

[39]PHAs for conventional public housing may keep 100 percent, for tenant-based Section 8 50 percent and project owners and agents may keep 20 percent. Guide at 18. HUD informed Congress that it will seek to modify existing statutes because "this sharing [of any back rent collection] is no longer appropriate in instances where HUD background checks discover the deficiency." Budget at 483.

[40]*See, e.g.,* 5 U.S.C.A. § 552a (West Supp. 1999)

[41]*See* Points on Legal Issues Regarding REAC's Matching of IRS Income Data to HUD Reporting System.

[42]This may not, however, preclude a POA from seeking a retroactive adjustment on its own.

[43]The six languages include Spanish, Korean, Arabic, Russian, Chinese (Mandarin) and Vietnamese.

[44]*See also* Guide at 19.

PRELIMINARY INJUNCTION AGAINST LOCAL RESIDENCY PREFERENCES TEMPORARILY UPHELD BY FIRST CIRCUIT

A split panel of the Court of Appeals for the First Circuit recently upheld a preliminary injunction issued against five Massachusetts public housing authorities (PHAs) that planned to apply local residency preferences to the issuance of new Section 8 vouchers in each of their respective jurisdictions.[1] The district court had issued the preliminary injunction on the grounds that application of the preferences by some of the authorities would violate a recently enacted statutory requirement that 75 percent of all newly issued vouchers must be given to families whose income is at or below 30 percent of area median and that application of the local preferences by three of the other authorities would violate the anti-discrimination provision of the Fair Housing Act.[2] Because, however, the Court of Appeals concluded that, absent intentional discrimination, the local residency preferences did not violate the Fair Housing Act's prohibition against race-based discrimination, it only affirmed the preliminary injunction based on the Fair Housing Act for a period of 90 days, at which time it ordered that the injunction either be vacated or reinstated based upon other Fair Housing Act claims made by the plaintiffs but not considered by the district court at the preliminary injunction stage of the case.

History of the Case

The case arose in 1998 after eight suburban Massachusetts housing authorities jointly advertised for new Section 8 voucher applicants and proposed to hold new, but separately conducted, lotteries to establish separate waiting lists to which each authority intended to apply a local residency preference, defined as persons living or working within the PHA's geographic jurisdiction. After announcement of the plan but before the lotteries were conducted, four very low-income individuals who lived outside the jurisdictions of all eight PHAs, together with the Massachusetts Coalition for the Homeless, sought a preliminary injunction against application of the preference. They contended that issuance of the vouchers in accordance with the authorities' plan would violate the 75 percent rule and the Fair Housing Act. The District Court issued a temporary restraining order allowing the authorities to conduct the lotteries but precluded them from applying the preference and issuing new vouchers until the court ruled on the preliminary injunction. The parties then conducted an analysis of the impact of the residency preference on the applicants' ranking using the results of the actual lotteries and, based on that analysis, the district court found that use of the local residency preference by two of the authorities would result in violation of the 75 percent rule and that their use by three of the other authorities would have a disparate racial impact on minority applicants. Accordingly, the district court enjoined two of the authorities from using the new lists until they presented to the court a specific plan for complying with the 75 percent rule and enjoined the other three authorities from distributing vouchers from the new lists using the local residency preference. The court did not enjoin the remaining three housing authorities because they could continue to distribute vouchers using existing waiting lists and were not ready to use the new lists. It did, however, require them to notify the court when they were ready to start using the new lists.

Court of Appeals Decision

On appeal, the authorities attacked the district court decision on five grounds, the first three of which the court of appeals dealt with in summary fashion. First, the authorities claimed that the district court made invalid assumptions as to who would obtain the vouchers and that its conclusions with respect to the violations of the 75 percent rule and Fair Housing Act were thus flawed. While acknowledging that the assumptions were made and that they may indeed turn out to be wrong, the court rejected the argument because cases such as this require that certain assumptions be made and the defendants had not offered alternative means by which to judge whether violations would occur. Second, the authorities argued that application of the residency preferences does not permanently deny vouchers to qualified persons but merely delays their obtaining assistance. The court rejected that argument because due to funding limitations the delays were likely to stretch into years such that for all practical purposes they were equivalent to denials. Third, the authorities claimed that the district court did not accord due weight to Congress' general support of local preference when it assessed the public's interest in having the injunction issued. Again, the court dismissed the argument on the grounds that Congress's view may bear on the preference's lawfulness, but if their use in these instances is unlawful, injunctive relief is appropriate.

The authorities' fourth claim suggested that compliance with the 75 percent rule could be achieved by means less intrusive than enjoining the use of local preferences altogether. They proffered to the court amendments to their respective plans that enabled them to pass over the next applicant with a local residency preference whenever the award of a voucher to that applicant would violate the 75 percent rule. The court of appeals agreed that the least in-

[1] *Langlois v. Abington Housing Authority*, ____ F.3d ____, 2000 WL 298566 (1st Cir. March 27, 2000).

[2] For more background on the district court opinion, *see Eight Massachusetts Housing Authorities Preliminarily Enjoined from Applying Local Preferences to Certificate and Voucher Programs*, 29 HOUS. LAW BULL 9 (Jan. 1999).

trusive means should be used to ensure compliance and that these new plans may in fact satisfy the requirements of the 75 percent rule. It nonetheless refused to overrule the issuance of the injunction because the authorities had not amended their plans until after the district court had issued its injunction and thought it best that the issue should be resolved in the district court, where the plaintiffs could express their view on the adequacy of the amendments.

The defendants' fifth and most significant attack on the injunction came with respect to the district court's determination that the local residency preference constituted unlawful racial discrimination under the Fair Housing Act. They argued that the court did not find any evidence of intentional discrimination, resting instead on what the authorities contended was a weak or inadequately proven case of disparate impact that disregarded the authorities' justification for the preference and a congressionally approved desire to permit PHAs to establish such preferences.

Addressing the first prong of the defendant's attack, the court held that one need not prove intentional discrimination in order to prevail under the Fair Housing Act. It thus joined three other circuit courts in finding that in addition to prohibiting intentional discrimination, "the Fair Housing Act prohibits actions that have an unjustified disparate impact."[3] However, the court qualified its position by stating that "merely to show a disparate racial impact is normally not enough to condemn. . . . [P]ractically all of the case law, both in employment and housing, treats impact as doing no more than creating a *prima facie* case, forcing the defendant to proffer a valid justification."[4]

The Court also rejected the second prong of defendants' argument, that the plaintiffs had either failed to show or showed only a weak case of disparate impact. Specifically, they contended that the district court inappropriately relied on the so-called "four-fifths formula"[5] to determine disparate impact because in cases where the numbers are small, as they were in the case of each of the housing authorities, the results are less reliable. Without disagreeing with the authorities' position, the court declined to disturb the district court's finding of disparate impact because the determination is fact-bound and the standard at the preliminary injunction stage—the likelihood of success on the merits—is lenient. It thus accepted the plaintiffs' position that the formula provides some evidence of discriminatory effect which may be enhanced by expert evidence once they have a chance to develop it at trial.[6]

Turning to the authorities' third and final prong, the court rejected what it contended was plaintiffs' position, namely that virtually nothing can justify disparate racial impact.

> This can hardly be so. . . . [D]isparate racial effects occur all the time from all manner of government and private actions; and Title VII, the employment counterpart to the Fair Housing Act provision in question, makes such impact merely the basis for requiring justification. Indeed, while Congress' amendment of the law after *Wards Cove Packing Co. v. Antonio* stiffened the employer's burden of justification, it left intact the principle that disparate impact merely creates a *prima facie* case.[7]

The court went on to find that the district court did not adequately consider the authorities' justification for adopting the local preferences, choosing instead to balance their objective against a showing of disparate impact and deciding which was more important in the case at hand. The court found this unacceptable, stating

> it is fair reading of the Fair Housing Act's "because of race" prohibition to ask that a demonstrated disparate impact in housing be justified by a legitimate and substantial goal of the measure in question; but beyond that, we do not think that the courts' job is to "balance" objectives, with individual judges deciding which seem to them more worthy.[8]

Having defined the test, the court proceeded to apply it to the instant case. It found legitimate the local agencies' desire to assist local constituents first, particularly in light of the fact that local residency preferences have a long history and Congress' endorsement of locally determined preference in the distribution of Section 8 vouchers when it adopted the amendments to the Fair Housing Act in 1998. The court thus concluded that "(absent intentional discrimination), the residency preference does not violate the 'because of race' provision of the Fair Housing Act standing alone."[9]

The court, nonetheless, refused to immediately lift the preliminary injunction against the two housing authorities because the plaintiffs in the district court had offered other legal bases—all growing out of statutory and regulatory provisions that impose obligations on HUD and PHAs to "affirmatively further" fair housing—for challenging the resi-

---

[3]Slip op. at 6.

[4]*Id.*

[5]The formula was developed by the Equal Employment Opportunity Commission for use in employment discrimination cases. Under the formula, disparate impact is shown to exist where the selection rate for any race is less than four-fifths the rate for the group with the highest selection rate.

[6]Slip op. at 6.

[7]*Id.* at 7 (citation omitted).

[8]*Id.* at 8. While conceding that the Seventh Circuit, in *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, did refer to balancing, the Court found that other circuits in later decisions come closer to using a simple justification test, which the court considered to be "by far the better approach." *Id* at 7.

[9]Although the court found it hard to imagine that an alternative existed that would allow the authorities to give local residents a preference without giving them a waiting list priority, it allowed the parties to revisit the issue on remand. *Id.* at 7.

dency preference based on racial effect. Thus, because it was not clear whether the residency preferences will survive on remand, the court allowed for the preservation of the status quo for a period of 90 days in order to allow the plaintiffs to develop alternative arguments not yet presented.[10]

The Dissent

The dissenting judge disagreed with the majority's Title VIII analysis and would have vacated the injunction immediately, leaving to the district court to decide whether to issue a temporary restraining order to preserve the status quo pending consideration of the plaintiffs' claims with respect to the defendant's obligations to further fair housing. In that judge's view, the court should have examined whether there is "some possibility of racial discrimination actually afoot,"[11] before assessing the legitimacy or substantiality of a justification offered in response to a disparate impact claim. Finding none, the dissenting judge would have dismissed the claim because the plaintiffs did not demonstrate a likelihood of success on the merits.

> [T]he possibility of discrimination is usually a given because the challenged measure, regardless of whether it was prompted by intentional discrimination, plausibly may be attributed to discriminatory "subconscious stereotypes and prejudices." And, in those cases in which there is no support for an inference of even subconscious discrimination, case law suggests that a challenged measure may still be regarded as "discriminatory" if it either perpetuates the effects of prior racial discrimination by the defendant or, without demonstrably advancing the interest asserted in justification, somehow impedes persons of color from competing on an equal footing with others.[12]

Analyzing the facts in this framework, the judge found neither subconscious discrimination nor perpetuation of prior racial discrimination because none of the defendant authorities are favoring town residents over nonresidents in the actual provision of housing, but only in how quickly they receive portable rental subsidies; that the housing authorities do not limit where voucher recipients can live, because under Massachusetts law they can use them anywhere within the Commonwealth; and, that the number of persons who would move up the waiting lists as a result of the preferences is minuscule, only 70 out of 3,850 applicants, or 1.8 percent, while 2,093, or 54 percent, of the people on the lists are members of racial or ethnic minorities.[13] The judge, moreover, rejected as "rank speculation" the possibility that racial segregation would be perpetuated by white recipients using the certificates to remain in town because there was no evidence to suggest how preferred white resident recipients or minority nonresident recipients would use the certificates.[14]

Turning to the final factor, the judge conceded that the preferences may prevent a disproportionate share of minority lottery winners from competing for spots at the top of the waiting lists. However, these impacts are justifiable because the preferences actually advance the interest of providing affordable housing to poor town constituents who have insufficient resources to purchase homes in their own towns.[15]

The decision is troubling in that it blurs the difference between local preferences and local residency preferences and erroneously suggests that Congress endorsed the latter when it adopted QHWRA.

Comment

The *Langlois* decision is both significant and troubling. This is the first time that the First Circuit has explicitly extended the disparate impact analysis, frequently used in employment discrimination cases under Title VII of the 1964 Civil Rights Act, to the Fair Housing Act. Moreover, if the court is to be taken at its word, the justification for overcoming disparate impact must be both legitimate and substantial.

The decision is troubling however, in that it blurs the difference between local preferences and local residency preferences and erroneously suggests that Congress endorsed the latter when it adopted the Quality Housing and Work Responsibility Act of 1998 (QHWRA). As a result, almost any local residency preference may meet the legitimate and substantial standard that the court enunciated. In its opinion, the court uses the terms "local preferences" and "local residency preferences" almost interchangeably, stating at one point that "[p]references for local constituents have a considerable history, and by the 1998 amendment Congress itself endorsed the use of locally determined preference in distributing Section 8 vouchers."[16] In fact, the term "local

[10]Slip op. at 9.

[11]Slip op. at 10.

[12]*Id.* (citations omitted).

[13]*Id.* at 11.

[14]*Id.*

[15]*Id.*

[16]*Id.* at 8. While acknowledging in a footnote that Congress did not define local preferences to include local residency preferences, the Court suggested as much when it went on to state that PHAs had previously adopted preferences for local residents and local residency preferences were already explicitly permitted by the pre-1998 HUD regulations. *Langlois,* Slip Op. Footnote 9.

preferences," in both its ordinary and statutory meaning, refers to any set of preferences adopted by a local PHA that provides occupancy preferences to families having certain characteristics.[17] It may or may not include a local residency preference. Thus, for example, after 1998, when Congress repealed the federal preferences that required housing authorities and Section 8 owners to provide admission preferences to, among others, persons who pay in excess of 50 percent of income for shelter, any local housing authority may choose to reinstate such a preference as a local preference.

While QHWRA obviously permits the use of local preferences, Congress hardly endorsed all local preferences, let alone local residency preferences as the Court implies.[18] Under both the public housing and certificate programs, QHWRA requires that local preferences be based upon local housing needs and priorities and that they be consistent with the public housing plans.[19] In turn, those plans must comply with Title VI of the Civil Rights Act of 1964, the Fair Housing Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990. Indeed, PHAs must certify the plans' compliance with these statutes and that they will affirmatively further fair housing.[20] Thus, any local preferences, including residency preferences, are clearly subordinate to the Civil Rights laws and must affirmatively further the goal of fair housing.

Moreover, the opinion disregards and goes against HUD's more cautious appraisal of local residency preferences which has resulted in its limiting their use when they have the "purpose or effect" of delaying or otherwise denying admission to a housing program based on a protected category. In reaching its opinion, the First Circuit never looked at or considered a host of HUD rules and pronouncements that express HUD's disfavor and skepticism about their use.[21] ■

[17] *See* 42 U.S.C.A. § 1437(d)(c)(4)(A) (West Supp. 1999).

[18] Congress moreover knows how to endorse specific preferences as it did in Section 514 of QHWRA, where, for example, it urges public housing authorities to include preferences for victims of domestic violence in their public housing plans. Pub. L. No. 105-276, § 514, 112 Stat. 2461, 2547 (Oct. 21, 1998).

[19] Pub. L. No. 105-276, § 514, 112 Stat. 2461, 2547 (Oct. 21, 1998).

[20] Pub. L. No. 105-276, § 511(d)(14), 112 Stat. 2461, 2534 (Oct. 21, 1998).

[21] *See e.g.* 24 C.F.R. §982.207 (64 Fed. Reg. 56,894, 56,912 (Oct. 21, 1999))(Final Section 8 voucher regulations) (Although a PHA is not prohibited from adopting a residency preference, the PHA may only adopt or implement residency preferences in accordance with non-discrimination and equal opportunity requirements); 24 C.F.R. §§ 5.655(c)(iv), 960.206(b)(1)(i) (54 Fed. Reg. 16,691, 16,720, 16,726 (Mar. 29, 2000))(residency preferences may not have the purpose or effect of delaying or otherwise denying admission to a project or unit based on the race, color, ethnic origin, gender, religion, disability or age of any member of an applicant family; project-based Section 8 owners may not adopt residency preferences without HUD approval).

RHS COMPELLED TO ENFORCE ITS RENT ROLLBACK AND REBATE REGULATIONS AGAINST FARMERS WHO ILLEGALLY CHARGED RENT TO THEIR FARMWORKERS

In 1991, several Michigan farmworkers who formerly resided in what was then Farmers Home Administration (FmHA) farmlabor housing initiated a nationwide class action against FmHA for its systematic failure to enforce its rent increase regulations against farmers who charged rent to their farmworkers in contravention of their agreement with the agency to provide the housing rent-free. The program at issue was the Section 514 Farmlabor housing program through which farmers, as well as nonprofit and public agencies, can obtain one percent, 33-year loans to provide affordable housing to farmlaborers.

Under one facet of the program, FmHA made loans to farmers to provide on-farm housing for their farmworkers and allowed them to forego all reporting and tenant certification requirements normally associated with FmHA rental housing on condition that they would not charge rent or utilities to their farmworkers. In their complaint, the farmworkers alleged that FmHA knowingly sanctioned wide-spread violations of the agreement not to charge rent and failed to enforce its rent-increase regulations. The latter require borrowers who seek to charge rent to first seek agency approval for the charges in accordance with the agency's regulations, which provide tenants with notice and an opportunity to comment on the proposed increase. If the borrower institutes a rent increase without agency approval, the regulations require the agency to notify the borrower that the rents have not been approved and to instruct the borrower to rollback and rebate or credit the improperly charged rents to the affected tenants.

Four years after initiating the class action, the federal district court ruled on the farmworkers' motion for summary judgment and concluded, based on the fact that the plaintiffs had documented more than 500 regulatory violations from the agency's own records and only one instance of enforcement, that FmHA had abdicated its regulatory responsibilities by failing to enforce the rent increase regulations. The court also ruled that FmHA acted arbitrarily and capriciously in enforcing labor housing regulations that allowed certain farmer borrowers to be exempt from reporting and other requirements with respect to rent charges if they agreed that they would not charge for rent.[1] Several months

[1] *Roman v. Korson*, 918 F. Supp. 1108 (W.D. Mich. 1995).

after issuing its opinion and after requiring the parties to submit briefs as to the injunctive relief to be entered, the court declined the plaintiffs' invitation to force the agency to comply with its regulations by affirmatively requiring it to take various enforcement actions against noncomplying farmers. Instead, it concluded that it was preferable to first allow the agency to correct its policy of non-enforcement before ordering specific relief. Consequently, the court enjoined the agency and its staff to "cease in their failure to enforce the rollback and rebate or credit duty" and to "cease in their failure to enforce the notice and comment duty." In a footnote, the court noted, however, that it expects that FmHA will be "vigilant in performing [its] regulatory duties" and that a "failure to take enforcement action in the future may warrant reconsideration of this decision and additional remedies."[2]

More than two years later, the plaintiffs secured information suggesting that the agency, by then renamed the Rural Housing Service (RHS), was not complying with the court's injunction. Though the plaintiffs requested additional information from RHS both informally and through a Freedom of Information Act [FOIA] request, they were unable to verify the extent of the agency's compliance because of the agency's recalcitrance to release information about its enforcement activities. Consequently, the plaintiffs moved the court to amend the 1996 order on the basis of scant information that they had obtained from independent sources and RHS' response to the FOIA request which was received after the plaintiffs filed their initial briefs with the court. While denying plaintiffs' motion without prejudice, the court permitted them to obtain discovery on the issue of the agency's post-judgement enforcement.[3]

After completing extensive discovery to aquire information about the agency's activities, the plaintiffs again moved the court to amend its order claiming that the agency violated the court's injunction by continuing to allow rent violations and by not enforcing its rent rollback and rebate regulations. The agency responded that it complied with the order, claiming that it had taken various affirmative steps to advise its staff of its regulatory obligations and inform borrowers who had charged rent illegally that they must roll back and refund illegally collected rent. The agency claimed that, as a consequence, a high percentage of borrowers brought their rent charges into compliance and a limited number of credits and rebates were actually collected. It supported its contention with a summary report purporting to show the extent of its enforcement actions.

Reviewing the evidence presented by the parties, the court, in an opinion and order issued on March 21, 2000,[4] noted that RHS' summary report contains omissions in the statistics which appear on the face of the summary sheet and that it does not appear that the federal defendants studiously checked the summary against individual records of borrowers. Moreover, the court found that some field offices in key states may not have followed agency policy, as set out in a 1996 Administrative Notice (AN), in determining the extent of violations. While noting that RHS' statistics were also not complete because compliance reporting ceased for nearly two years due to RHS failing to renew the AN, the court nonetheless concluded that RHS had made drastic improvements in advising its staff of the various regulatory requirements, in requiring borrowers to obtain approval for rental and utility charges, and in notifying borrowers of improper rent and utility charges.[5]

The court found that plaintiffs' statistics confirmed that agency staff rarely moved beyond sending an initial servicing notice to borrowers to enforce the rebate or credit obligation and noted that the agency acknowledged its weakness in an internal memorandum that shows that full compliance was achieved in less than 10 percent of the cases.

The court was troubled, however, by the agency's record in enforcing the rebate and credits provision of the regulations. It found that plaintiffs' statistics confirmed that agency staff rarely moved beyond sending an initial servicing notice to borrowers to enforce the rebate or credit obligation and noted that the agency acknowledged its weakness in an internal memorandum that shows that full compliance was achieved in less than 10 percent of the cases.[6] The court thus found that

> Plaintiffs are correct in concluding that "the Agency's unofficial policy with regard to unauthorized charges is to ignore them." So long as the borrowers receive only an initial servicing letter informing them of non-compliance without threat of later enforcement, few rebates will be paid and the Federal Defendants' enforcement of the rebate or credit duty will remain essentially fictional.[7]

[2]*Roman v. Korson*, No. 1:91-CV-274 (W.D. Mich., Feb. 9, 1996) (Unreported opinion).

[3]*Id.* (W.D. Mich., March 18, 1999) (Unreported order and opinion).

[4]*Roman v. Korson*, ___ Fed. Supp. 2d ___, 2000 WL 305831 (W.D. Mich., March 21, 2000).

[5]Slip op. at 7.

[6]*Id.* at 8.

[7]*Id.*

Having found that RHS failed to enforce the rent rebate and credit regulations, the court next considered its authority to modify the permanent injunction that it had entered in 1996. RHS contended that because the injunction was originally entered after a finding that the agency totally abdicated its responsibilities, it could now only be modified upon a new showing of a policy of abdication, which it contended no longer exists on the present record. The court disagreed with the agency's factual and legal positions.

> The premise, that there is no longer a policy of abdication, is accurate as to the notification and approval duty, since the Agency has taken active steps to inform borrowers of regulatory requirements and to approve rental charges. However, the non-enforcement of the rebate or credit duty represents a continued policy of abdication such that further injunctive relief is clearly necessary.[8]

The court also rejected the agency's legal position that a further injunction requires proof of a continued policy of abdication.

> This statement confuses the standard for originally entering an injunction in an Administrative Procedures Act case of this kind with the standard for modifying such an injunction once it is entered. Under federal law and Federal Rule of Civil Procedure 60(b)(5), parties affected by an injunction are entitled to move the injunction's modification. The standard of proof for modification depends in large part on the kind of modification sought.

Relying on *Epic Metal's Corp. v. Souliere, Sr.*,[9] the court determined that the operative question is not whether there is now a complete abdication but whether the purpose of the injunction has been fulfilled. "In this case, because the goal of the injunction is to enforce the regulatory duties, the Plaintiffs need only prove that the enforcement of the regulatory duties has been unfulfilled."[10] Based on the record, the court concluded that the purpose of the injunction has gone unfulfilled in part and that additional remedies are needed.

Turning to the issue of relief, the court also rejected RHS' contention that courts should generally not mandate specific agency action and should instead explain the law and remand for agency action consistent with the explication. It concluded that remand is a starting place, which, if ignored, must lead to more extensive remedies. Without the power to go beyond a remand order which was ignored, the court concluded, Article III courts would be transformed into toothless tigers without effective control of lawless agencies.[11]

Accordingly, the court modified the injunction to require RHS:

- to reissue the Administrative Notice first published in 1996 and set to expire in April of 2000 for a period of at least three consecutive years;
- to send a second letter to all borrowers who do not respond to the agency's initial letter asking them to comply with agency regulations;
- to send a final warning letter to all borrowers who do not respond to the second letter;
- to forward a problem case report to the state director for enforcement as to all borrowers who have not adequately responded to a final warning letter; and
- to provide detailed quarterly reports of compliance to plaintiffs and the court with supporting documentation for each borrower in accordance with the provisions of RHS regulations.[12]

In a footnote in the opinion, the court also warned the agency to stop two practices that were uncovered by the plaintiffs through discovery. In the first, the Rural Development State Director instructed field workers not to pursue rollbacks, credits or rebates in cases where farmers had charged for utilities based upon an initial understanding with the agency that such charges need not be approved by the agency. The court noted that this practice "flatly contradicts the language of the regulations and the Federal Defendants' own AN."[13] The second practice against which the court warned was the agency's permitting borrowers to prepay loans without scrutiny of whether the borrowers have neglected to rebate or credit to tenants unauthorized occupancy charges. "Neither of these practices," the court warned, "should be used by the Agency as a means of circumventing the regulations."[14]

It remains to be seen whether RHS will appeal the modification or finally see to it that thousands of farmworkers, most of whom are Hispanic, are refunded the rents that they were illegally charged by farmers who obtained low-interest loans in return for a promise not to charge rents to their farmworkers.

---

[8] *Id.* at 9

[9] 181 F.3rd 1280 (11th Cir. 1999).

[10] Slip op. at 10.

[11] *Id* at 11.

[12] *Id.* at 12-14.

[13] *Id.* Footnote 4.

[14] *Id.*

Legal Services and other advocates working with farmworker clients should consult with their clients to determine if they may have worked for and lived in farm labor housing owned by their farmer employers, whether they were charged for rent and/or utilities for residing in the housing, both directly or indirectly through deductions from wages, and whether they knew if the housing was financed by Farmers Home Administration or the Rural Housing Service. If so, they should be directed to the local Rural Development office for assistance in claiming a rebate or credit. Persons needing more information about the litigation and client remedies should contact Gideon Anders at NHLP (510) 251-9400 ext. 103. ■

RHS CLOSES LOOPHOLE IN ITS REGULATIONS GOVERNING PREPAYMENT OF POST-1979 PRE-1989 RENTAL HOUSING LOANS

Prior to 1987, owners of Farmers Home Administration (FmHA) Section 514 Farmlabor and Section 515 Rural Rental housing that was financed prior to December 21, 1979, could prepay their loans at any time and convert the housing to moderate income uses, often causing displacement of the current tenants. In 1987, Congress adopted legislation that restricted these owners' right to prepay their loans by providing FmHA, since succeeded by the Rural Housing Service (RHS), the authority to offer incentives to owners to remain in the program or, in the alternative, to require them to offer the housing for sale to nonprofit or public agencies if the prepayment would adversely affect minority housing opportunities or cause displacement of current tenants.[1] In 1989, Congress extended that legislation to projects that were financed between December 21, 1979 and December 15, 1989, which were subject, mostly, to 20-year use restrictions but no prepayment restrictions.[2] Like the 1987 legislation, the 1989 legislation was intended to extend to residents of post-1979 and pre-1989 projects the same protections that were accorded to pre-1979 residents.

Unfortunately, FmHA interpreted the 1989 legislation as authorizing owners of post-1979 and pre-1989 projects to apply for prepayment prior to the expiration of their initial use restrictions and requiring the agency to offer them incentives to remain in the program. When a number of owners took advantage of that interpretation to secure financial incentives from the agency in the form of equity loans and increased rates of return, Congress adopted new legislation in 1996 that precluded the agency from offering incentives to owners of post-1979 and pre-1989 projects prior to the expiration of their initial use restrictions.[3]

RHS erroneously believed that the 1996 legislation also left it without authority to attach the 1989 prepayment restrictions to loans subject to use restrictions or to take any other action that would discourage owners of these projects from prepaying their loans prior to the expiration of the original use restrictions. Several Section 515 owners, whose initial use restrictions were within one or two years of expiration, took advantage of the agency's position by applying to prepay their loans. When RHS was unable to offer them incentives to remain in the program, the owners prepaid their loans and RHS merely required them to abide by their preexisting use restriction until their term expired. Thereafter, under the agreement with RHS, the owners were free to displace the current residents and convert the housing to moderate or above-moderate income housing.[4]

Sensing an opportunity to avoid having the 1989 prepayment restrictions attach to their loans, a growing number of owners began to submit prepayment requests that would allow them to prepay their loan several months before the expiration of the initial use restrictions. By agreeing to maintain the housing as affordable for the balance of the use-restricted term, which could be as short as one or two months, these owners only had to subsidize current residents for one or two months in order to maintain the project's pre-prepayment rent structure until the end of the term of the initial use restriction. Thereafter, they would be free to raise rents and displace all the residents. Clearly, for owners of projects located in markets where rents have increased substantially, the profits that awaited them at the end of the use restricted term far outweighed the cost of subsidizing current residents for a short period of time, particularly when the early prepayment circumvented their having to comply with the 1989 prepayment restrictions.

RHS became so concerned about the prospect of losing affordable projects and facing renewed outcries about tenant displacement that it seriously considered asking Congress for additional corrective legislation. Fortunately, resident advocates were able to convince the agency that it had ample statutory authority to control the situation and that corrective legislation was unnecessary if the agency simply changed its regulations.

On December 9, 1999, RHS responded to advocates by issuing a new Administrative Notice (AN) advising Rural Development (RD) staff how to respond to prepayment requests from owners of projects with use restrictions in place,

[1] *See* 42 U.S.C.A. §1472(c) (West 1994).

[2] *See Id.* §1472(c)(1)(A).

[3] *See Id.* §1472(c)(4)(C).

[4] Residents of such projects who are facing increased rents or displacement could challenge the prepayment and the RHS agreement on the grounds that they are not consistent with the law.

which included post-1979 and pre-1989 projects as well as pre-1979 projects that were subjected to use restrictions in that period because of some servicing action.[5] The AN directs RD staff to encourage any owner who seeks to prepay such a loan to extend the use restrictions for a term of 20 years, although it makes clear that incentives to do so are unavailable. If the owner declines, RD staff must determine whether the prepayment will adversely impact minority housing opportunities or the need for affordable housing in the community. If there is an impact on minority housing opportunities, the owner may prepay only by agreeing to maintain the housing as affordable housing for the remaining term of the current use restrictions and, at the end of that term, to offer the project for sale to a nonprofit or public agency.

The owner must also agree to protect all tenants in residence at the time the use restrictions expire for as long as they continue to reside in the project.

If the prepayment will not have an impact on minority housing opportunities but there is a continuing need for affordable housing, the owner must sign an agreement to maintain the housing as affordable housing for the remaining term of the use restrictions. The owner must also agree to protect all tenants in residence at the time the use restrictions expire for as long as they continue to reside in the project by maintaining the rents for these residents as if the project were continuing to receive RHS subsidies.

If there is no impact on minority housing opportunities and there is no further need for the housing, the owner must merely agree to maintain the housing as affordable housing for the remaining use-restricted term.

In each of these cases, the owner must sign and record the appropriate agreement with RHS that reflects the owner's continuing obligations. Owners unwilling to sign such an agreement will be denied the right to prepay the loan or required to sell the development to a nonprofit or public entity.

It is expected that the policy announced in the AN will discourage owners from prepaying post-1979 and pre-1989 loans before the expiration of the term of the use restrictions because it will substantially increase their financial obligation to maintain affordability after prepayment. In some cases, moreover, it will place additional obligations on owners to sell the projects to nonprofit or public agencies at the end of the use-restricted term, potentially making it more attractive financially to remain in the program and seek financial incentives when the use restrictions expire. ■

[5]RD AN 3500 (1965-E)(December 9, 1999). The AN is available electronically at www.rdinit.usda.gov/regs/an_list.html.

RECENT HOUSING-RELATED REGULATIONS AND NOTICES

The following are significant housing-related regulations and notices that HUD or USDA have recently issued. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each Notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's website on the World Wide Web,[1] (2) bound volumes of the Federal Register, (3) HUD Clips,[2] (4) HUD,[3] and (5) USDA's/Rural Development web page.[4] Citations are included with each document to help you secure copies.

HUD Regulations

Amendments to HUD's Mortgagee Review Board and Civil Money Penalty; Interim Rule
65 Fed. Reg. 9,084-9,087 (Feb. 23, 2000)

Summary: Makes changes to reflect statutory changes made by the Multifamily Assisted Housing Reform and Affordability Act of 1997 (the Multifamily Reform Act) which, among other amendments, provides that a suspension issued by the HUD Mortgagee Review Board is effective, without previous 30-day written notice of violation to the mortgagee, if there is sufficient evidence that immediate action is required to protect the financial interests of HUD or the public. The Multifamily Reform Act also expanded the list of persons and types of violations subject to a civil money penalty under HUD's insured housing programs. The interim rule also makes three clarifying, non-substantive amendments to these regulations: (1) clarifies under what conditions HUD's Mortgagee Review Board may issue a suspension; (2) clarifies the effect of a suspension or withdrawal issued by the Board; and (3) clarifies that the Assistant Secretary for Public and Indian Housing may initiate a civil money penalty under the section 184 Indian housing loan guarantee program.

Effective Date: March 24, 2000.

Comments Due Date: April 24, 2000.

Allocation of Funds Under the Capital Fund; Capital Fund Formula; Final Rule
65 Fed. Reg. 14,422-14,429 (Mar. 16, 2000)

Summary: This final rule implements a new formula system for allocation of funds to public housing agencies for their capital needs. This final rule follows publication of a

[1]At http://www.access.gpo.gov/su-docs.

[2]At http://www.hudclips.org/cgi/index.cgi.

[3]To order Notices and Handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.

[4]At http://www.rdinit.usda.gov/regs/.

proposed rule on September 14, 1999, which was developed through negotiated rulemaking, and takes into consideration public comment received on the proposed rule.

Effective Date: April 17, 2000.

Changes to Admission and Occupancy Requirements in the Public Housing and Section 8 Housing Assistance Programs; Final Rule
65 Fed. Reg. 16,692-16,733 (Mar. 29, 2000)

Summary: Implements changes to the admission and occupancy requirements for the public housing and Section 8 assisted housing programs made by the Quality Housing and Work Responsibility Act of 1998. These changes concern choice of rent, community service and self-sufficiency in public housing, and admission preferences and determination of income and rent in public housing and Section 8 housing assistance programs. This final rule follows a proposed rule published on April 30, 1999, and takes into consideration the public comments received on the proposed rule.

Effective Date: The provisions of this rule are effective on April 28, 2000, except for the provisions of Sec. 5.661, which will become effective when the information collections it contains receive approval from the Office of Management and Budget. The announcement of approval and the effective date will be published in the Federal Register.

Section 8 Tenant-Based Assistance; Statutory Merger of Section 8 Certificate and Voucher Programs; Housing Choice Voucher Program; Correction

Summary: This document makes various corrections to HUD's October 21, 1999, final rule implementing the statutory merger of the Section 8 tenant-based certificate and voucher programs into the new Housing Choice Voucher program. Additionally, this document corrects several regulatory provisions of the new Section 8 merger program that were not part of the October 21, 1999, final rule. These technical, non-substantive amendments will help to ensure that, once codified, the regulations for the Housing Choice Voucher program are free of error and consistent with other HUD program requirements.

Effective date: November 22, 1999.

HUD Federal Register Notices

Notice of Amendment and Republication of Notice of Funding Availability (NOFA) for the Public Housing Drug Elimination Program (PHDEP) Gun Buyback Violence Reduction Initiative
65 Fed. Reg. 5,399-5,403 (Feb. 3, 2000)

Summary: HUD is amending and republishing its Public Housing Drug Elimination Program Gun Buyback Violence Reduction Initiative NOFA (PHDEP Gun Buyback NOFA), published in the Federal Register of November 3, 1999 (64 Fed. Reg. 60,080). That NOFA invited PHAs to direct FY 1999 PHDEP funds for use in gun buyback programs and made PHDEP set aside matching funds available. This amendment makes clear that while HUD's matching funds are to be drawn only from the FY 1999 PHDEP set aside, PHAs' expenditures are not restricted to FY 1999, but may come from PHDEP grant funds regardless of fiscal year. PHAs that have already applied under the November 3, 1999, NOFA need not re-apply but may seek additional funding.

Redelegation of Authority for Review and Approval or Disapproval of PHA Plans; Notice
65 Fed. Reg. 7,559-7,560 (Feb. 15, 2000)

Summary: The Assistant Secretary for Public and Indian Housing redelegates the authority for review and approval or disapproval of the Five-Year Plans and Annual Plans of a public housing agencies (PHAs) under 24 C.F.R. Part 903, and conducting all activities related to such review, approval or disapproval, to the Offices of Public Housing Hub Directors, Program Center Coordinators, and to the Directors of Troubled Agency Recovery Centers, with exceptions.

Effective Date: January 28, 2000.

Super Notice of Funding Availability (SuperNOFA) for HUD's Housing, Community Development and Empowerment Programs and Section 8 Housing Voucher Assistance for Fiscal Year 2000; Notice
65 Fed. Reg. 9,320-9,989 (Feb. 24, 2000)

Summary: This SuperNOFA announces the availability of approximately $2.424 billion in HUD program funds covering 39 grant categories within programs operated and administered by HUD offices and Section 8 housing voucher assistance. The General Section of this SuperNOFA provides the application procedures and requirements that are applicable to all the programs in this SuperNOFA. The Programs Section of this SuperNOFA provides a description of the specific programs for which funding is made available and describes any additional procedures and requirements that are applicable to a specific program.

Application Due Dates: Vary by program and are contained in the SuperNOFA.

Notice of Annual Factors for Determining Public Housing Agency Ongoing Administrative Fees for the Section 8 Housing Choice Voucher Program and the Rental Certificate and Moderate Rehabilitation Programs; Notice
65 Fed. Reg. 10,316-10,372 (Feb. 25, 2000)

Summary: Announces the monthly per-unit fee amounts for use in determining the on-going administrative fee for public housing agencies (PHAs) administering the Section 8 housing choice voucher program, and the rental certificate and moderate rehabilitation programs (including Single Room Occupancy and Shelter Plus Care) during Federal Fiscal Year (FY) 2000.

Effective Date: This notice is effective upon publication.

Notice of Funding Availability; Fair Share Allocation of Incremental Voucher Funding Fiscal Year 2000; Notice
65 Fed. Reg. 13,222-13,230 (Mar. 10, 2000)

Summary: The purpose of this NOFA is to invite public housing agencies (PHAs) to apply for vouchers on a fair-share allocation basis under the Section 8 Housing Choice Voucher Program. The vouchers are for issuance to families on a PHA's Section 8 waiting list to enable these families to rent decent, safe and affordable housing of their choice on the private rental market. Funds of approximately $346,560,000 are available in one-year budget authority for approximately 60,000 Section 8 vouchers. Only public housing agencies (PHAs) are eligible to apply. Indian Housing Authorities (IHA), Indian tribes and their tribally designated housing entities are not eligible applicants. The Native American Housing Assistance and Self-Determination Act of 1996 does not allow HUD to enter into new Section 8 annual contributions contracts (ACC) with IHAs after September 30, 1997.

Application Due Date: April 24, 2000.

Fiscal Year 2000 Notice of Funding Availability for Service Coordinators in Multifamily Housing; Notice of Funding Availability (NOFA)
65 Fed. Reg. 14,708-14,714 (Mar. 17, 2000)

Summary: Announces the FY 2000 funding available for the Service Coordinator Program in multifamily housing. The purpose of the program is to allow multifamily housing owners to assist elderly residents and residents with disabilities to obtain needed supportive services from the community, in order to enable them to continue living as independently as possible in their apartments. Approximately $25 million in funds are available. Only owners of eligible developments may apply. Property management companies may administer grant programs but are not eligible applicants.

Application Deadline: July 17, 2000.

Notice of Certain Operating Cost Adjustment Factors
65 Fed. Reg. 15,452-15,498 (Mar. 22, 2000)

Summary: Establishes factors used in rent adjustments under Section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) as amended by the Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act of 1999, and under the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA).

Effective Date: March 20, 2000.

Final Report of HUD Review of Model Building Codes; Notice of Publication
65 Fed. Reg. 15,740-15,794 (Mar. 23, 2000)

Summary: HUD issues a policy statement and Final Report of HUD Review of Model Building Codes (Final Report) that identifies the variances between the design and construction requirements of the Fair Housing Act (the Act) and the: BOCA National Building Code (BNBC), Building Officials and Code Administrators International (BOCA) 1996 edition; Uniform Building Code (UBC), International Conference of Building Officials (ICBO) 1997 edition; Standard Building Code (SBC), Southern Building Code Congress International (SBCCI) 1997 edition; and International Building Code First Draft (IBC), International Code Council (ICC) November 1997; and Proposed International Building Code 2000, International Code Council (IBC-2000) Chapters 10 and 11, Appendix to Chapter 11, and Section 3407 (1999). This Final Report also contains guidance on the Department's policy concerning the relationship between the requirements of the Act and its standards. This Final Report and the policy statement are also located at www.hud.gov/fhe/modelcodes. The Fair Housing Act, as amended in 1988, the regulations implementing the Act, and the Fair Housing Accessibility Guidelines can also be obtained through links provided at this web site.

Notice of Funding Availability for Fiscal Year (FY) 2000 for Section 8 Family Self-Sufficiency Program Coordinators; Notice
65 Fed. Reg. 17,114-17,118 (Mar. 30, 2000)

Summary: The Section 8 FSS program is intended to promote the development of local strategies to coordinate the use of assistance under the Section 8 certificate and voucher programs with public and private resources to enable participating families to achieve economic independence and self-sufficiency. An FSS program coordinator assures that program participants are linked to the supportive services they need to achieve self-sufficiency. Available Funds: This NOFA announces the availability of up to $29 million in Fiscal Year (FY) 2000 to fund Section 8 Family Self-Sufficiency (FSS) program coordinators. Eligible Applicants: Public housing agencies (PHAs) eligible to receive funding under this NOFA are only those that received funding under one of the FY 99 NOFAs for Section 8 FSS Program Coordinators and that continue to operate a Section 8 FSS program.

Application Deadline: May 30, 2000.

HUD Notices

Fiscal Year (FY) 2000 Performance Funding System (PFS) Inflation Factor, Equation, and Related Tables and Special Notes Related to Operating Subsidy Eligibility PIH 00-4 (Feb. 3, 2000)

Summary: This Notice transmits the updated Inflation Factor, equation, and related tables which must be used for the determination of operating subsidy eligibility for Public Housing Agencies (HAs) operating locally-owned projects for Fiscal Years Beginning January 1, April 1, July 1, and October 1, 2000. In addition, special notes have been provided to assist PHAs in the determination of subsidy eligibility.

Fiscal Year (FY) 2000 Subsidies for Operation of Low-Income Housing Projects
PIH 00-3 (Feb. 3, 2000)

Summary: This Notice advises Public Housing Agencies (HAs) of the pro-ration of operating subsidy eligibility during Federal Fiscal Year (FY) 2000 (HA fiscal years beginning January 1, April 1, July 1, and September 1, 2000). The HUD Appropriations Act includes $3.138 billion for FY 2000 operating subsidy requirements. Under current authorizations, the amount appropriated in the FY 2000 Appropriations Act will not be sufficient to cover total subsidy requirements for both Performance Funding System (PFS) and non-PFS projects. Accordingly, payments to all HAs will be based on 98.5 percent of the full eligibility of each as determined by the PFS, or the appropriate alternate approach for the non-PFS HAs and projects. Should actual requirements for FY 2000 vary significantly from the estimate, this percentage is subject to change.

Section 8 Tenant-Based Assistance (Enhanced and Regular Housing Choice Vouchers) for Housing Conversion Actions in Federal Fiscal Year (FY) 2000 Policy and Processing Guidance PIH 00-09 (Mar. 7, 2000)

Summary: The purpose of this notice is to alert public housing agencies (PHAs) that HUD will provide funds for Section 8 housing choice vouchers (vouchers) to assist certain residents affected by owner or HUD actions resulting from a Housing conversion action. This notice (1) describes the types of Housing conversion actions under which the Department, subject to the availability of appropriations, will make Section 8 tenant-based assistance available through the administering PHA to the eligible residents; (2) explains which conversion actions will result in the residents qualifying for enhanced voucher assistance under Section 8(t) of the United States Housing Act of 1937 as opposed to regular voucher assistance; (3) provides program guidance on the administration of enhanced voucher assistance; and (4) covers general programmatic issues and describes the funding process for all tenant-based conversion actions in FY 2000. The notice also provides information on several statutory changes affecting the administration of preservation vouchers and certificates made available through HUD's FY 1997, 1998, and 1999 Appropriations Acts.

Rural Housing Service Regulation

Notice of Funds Availability (NOFA) Inviting Applications for the Rural Community Development Initiative (RCDI); Notice 65 Fed. Reg. 14,525-14,532 (Mar. 17, 2000)

Summary: Announces the availability of $6 million of grant funds for the RCDI program. Applicants must provide matching funds from non-Federal sources in an amount at least equal to the Federal grant. These grants will be made to qualified intermediary organizations that will provide technical assistance to recipients to develop their capacity and ability to undertake projects to improve housing, community facilities, or community and economic development. This Notice lists the information needed to submit an application for these funds.

Application Deadline: June 15, 2000.

Rural Housing Service Notices

Prepayment Process for MFH Loans Made Between 1979-1989 and Others Which Have Unexpired Restrictive-Use Provisions AN 3500 (1965-E) (Dec. 9, 1999)

Summary: To provide guidance on how to process prepayment requests from Multi-Family Housing (MFH) borrowers who received Section 514 or Section 515 loans on which restrictive-use provisions are still in place. Note that these include Section 514 and 515 loans made after December 21, 1979, and before December 15, 1989, Section 514 loans made after December 14, 1989, and Section 514 and 515 loans which have restrictive-use provisions as a result of a servicing action. RD Instruction 1965-E procedures on this topic are currently insufficient to fully implement the requirements of the Housing Act of 1949, as amended.

Revised Reporting, Authorization and Acceleration Requirements Related to MFH Preservation Related Activities; AN No. 3527 (1965-E) (Mar. 24, 2000)

Summary: To help standardize decision-making during the prepayment process for Multi-Family Housing (MFH) projects, the Office of Rental Housing Preservation (ORHP) has updated the process for reporting information and receiving authorization for incentives. This Administrative Notice (AN) clarifies RD Instruction 1965-E and revises Guide Letter 1965-E-1. In addition, this AN discusses the Agency's responsibility to consider the impact of acceleration actions on preservation, introduces the concept of third-party equity loans, and provides guidance on making general incentive offers.

The Housing Law Bulletin is published 10-12 times per year by the National Housing Law Project, a private nonprofit corporation of the State of California. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions or policy of any funding source.

A one-year subscription to the Bulletin is $150.

Inquiries or comments should be directed to Eva Guralnick, Editor, Housing Law Bulletin, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

NATIONAL HOUSING LAW PROJECT

TELECONFERENCE REGISTRATION FORM

Name: _____

Organization: _____

Address: _____

City/State _____ Zip _____

Telephone (___)_____ Fax _____

e-mail: _____

Please estimate the number of people that will be listening in on May 16: _____

Please check one:

❑ I would like to download the materials for the teleconference from NHLP's website

OR

❑ I would like to have them sent to me by e-mail (WordPerfect 6/7/8/9 format)

OR

❑ I would like to have them sent to me by ordinary mail

I am registering for the May 16 Teleconference (Deadline: May 8) $30/line $ _____

Make check payable to the National Housing Law Project and mail to:

National Housing Law Project
614 Grand Avenue, Suite 320
Oakland, CA 94610

PUBLICATION ORDER FORM

NATIONAL HOUSING LAW PROJECT
614 Grand Avenue, Suite 320
Oakland, California, 94610
(510) 251-9400; fax: (510) 451-2300

	PRICE	QTY.	TOTAL
HUD Housing Programs: Tenants' Rights (2d ed. 1994)	$165.00	_____	$ _____
HUD Housing Programs: Tenants' Rights (1998 Supplement)	$120.00	_____	$ _____
Combined HUD Housing Programs: Tenants' Rights and 1998 Supplement (add $6.00 postage/handling)	$220.00	_____	$ _____
RHCDS (FmHA) Housing Programs: Tenants' and Purchasers' Rights (2d ed. 1995)	$55.00	_____	$ _____
Combined HUD Housing Programs (2d ed.), 1998 Supplement and RHCDS (FmHA) Housing Programs (add $9.00 postage/handling)	$250.00	_____	$ _____
Housing Law Bulletin (annual subscription, 10-12 issues)	$150.00*	_____	$ _____
Congress' New Public Housing and Voucher Programs (1998)	$10.00**	_____	$ _____
Housing for All: Keeping the Promise (1995)	$5.00*	_____	$ _____
The Family Self-Sufficiency Program: An Advocate's Guide (1994)	$10.00*	_____	$ _____
Let's Choose a New Owner! What Residents Need to Know When an Owner Wants to Sell an Expiring-Use Project Under Title VI (1993) (master for duplicating)	$10.00*	_____	$ _____
A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs (1991)	$10.00*	_____	$ _____

*Includes postage and handling
** $5.00 each additional copy

Subtotal: _____ **$** _____

Tax (California residents only): **(Subtotal, excluding Bulletin x 8.25%):** **$** _____
Postage and Handling: **Number of books _____ x $3.00 per book:** **$** _____

TOTAL AMOUNT ENCLOSED: $ _____

PLEASE TYPE OR PRINT

Name_____

Organization_____

_____

Address_____

_____ Zip_____

ALL ORDERS MUST BE PREPAID

Please do not send cash. Make check or money order payable to the NATIONAL HOUSING LAW PROJECT, attach to a copy of this form and send to:

NATIONAL HOUSING LAW PROJECT
614 Grand Avenue, Suite 320 • Oakland, CA 94610
Attention: Publications Clerk

All materials are mailed book rate. Allow four weeks for delivery. For more information on first-class mailing and large quantity discounts, call (510) 251-9400.

National Housing and Community
Development Law Project
614 Grand Avenue, Suite 320
Oakland, California, 94610

First Class Mail